Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH T. RICHEY,
Petitioner,

v.

STATE OF OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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November 28, 1995

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79 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the procedure provided by the State of Ohio pursuant to *State* v. *Murnahan*, 63 Ohio St.3d 353, 584 N.E.2d 1204 (1992) and Ohio Rule of Appellate Procedure 26(B), precluded meaningful review of the merits of Richey's claim of ineffective assistance of appellate counsel and violated his right to due process of law under the Sixth and Fourteenth Amendments of the United States Constitution.

2. Whether the ineffective assistance of petitioner's prior appellate counsel violated his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Kenneth T. Richey respectfully petitions for the issuance of a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio denying Richey's *Murnahan* petition for reopening of his direct appeal on the basis of ineffective assistance of appellate counsel is reported at *State* v. *Richey*, 73 Ohio St.3d 523, 653 N.E.2d 344 (1995). (App. A at 1A-3A). The decision of the Ohio Court of Appeals

for the Third Judicial District, Putnam County denying Richey's *Murnahan* petition is unreported. (App. B at 4A-7A). The decision of the Supreme Court of Ohio in Richey's direct appeal is reported at *State* v. *Richey*, 64 Ohio St. 3d 353, 595 N.E.2d 915 (1992). (App. C at 8A-52A).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall *** deprive any person of life, liberty or property, without due process of law; ***.

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

PROCEEDINGS BELOW

Early in the morning of June 30, 1986, firefighters and law enforcement officials were called to the scene of a fire at the Old Farm Village apartment complex near Columbus Grove. When they arrived, they saw Kenneth Richey attempting to enter a burning apartment building. Richey was yelling at the

firefighters that a child, Cynthia Collins, was trapped in the apartment. (Trial Transcript at 176, 300, 342-43, 474, 476-77, 878-81) [hereinafter Tr.]. He had to be physically restrained from entering the burning apartment and was pulled away and placed in custody of Columbus Grove Police Chief Tom Miller to prevent him from further attempts to rescue Cynthia. (Tr. 651-54).

Later that morning, Richey was questioned by Chief Miller at the police station and then driven back to the apartment complex where he was living with his father. (Tr. 656-58). At approximately noon that day, Richey was questioned at his father's apartment by Chief Miller and Sergeant Steve Stechschulte. (Tr. 659-60, 940). The next day, July 1, 1986, Richey was arrested and charged in connection with the fire.

The grand jury returned a five count indictment against Richey. The testimony before the grand jury was not recorded. Richey subsequently entered a plea of not guilty to all counts.

The Trial and Pre-trial Hearings

At the pre-trial motions hearing on December 12, 1986, the trial judge erroneously instructed Richey that he had to make a final decision that day whether to waive his right to a jury trial. Based on the trial judge's instruction, Richey waived his right to a jury. On January 5, 1987, Richey appeared before a three-judge panel of the Court of Common Pleas of Putnam County and entered a plea of not guilty to all counts.

The State's theory at trial was that Richey set fire to the Collins apartment because he intended to kill his former girlfriend Candy Barchet and/or her new boyfriend Mike Nichols, while they were sleeping in the apartment directly below the Collins apartment. The state contended that Richey (while wearing a splint on one hand) poured accelerants into cans, poured the accelerants on the rug, ran a stream of fluid out to the

deck, then lit the accelerant and jumped off the deck. The State called several witnesses, including the arson investigator, Robert Cryer. Cryer testified that traces of gasoline and paint thinner were found in samples taken from the living room carpet, which had been retrieved from a dump site where it had sat under a pile of garbage for two days. Laboratory tests, however, did not detect any traces of accelerants on Richey's boots, clothes or duffle bag.

The panel returned verdicts of guilty on the charge of aggravated murder with specific intent to kill Cynthia Collins, the aggravated arson charge, the breaking and entering charge, and the child endangering charge. The panel dismissed the involuntary manslaughter charge. The State has subsequently conceded that there was no evidence Richey intended to kill Cynthia Collins.

On January 26, 1987, a capital sentencing trial was held before a three-judge panel. On March 10, 1987, Richey filed a notice of appeal in the Court of Appeals for the Third Judicial District, Putnam County. Richey filed his merit brief in the Court of Appeals on September 29, 1987. On December 28, 1989, the Court of Appeals affirmed the trial court's convictions and death sentence. Because of the ineffective representation of Richey by his appellate counsel, however, the Court of Appeals did not have vital information before it when it made this decision.

Prior appellate counsel, among other things, (i) completely failed to raise numerous meritorious issues; (ii) inadequately addressed, and thus effectively nullified, other substantial issues; and (iii) undermined Richey's appeal by not raising certain meritorious claims solely because of an undisclosed conflict of interest. Richey timely filed a Notice of Appeal to the Ohio Supreme Court in his first appeal as of right. The Supreme Court of Ohio narrowly affirmed his convictions and sentence of death by a 4-3 vote on August 12, 1992. The opinion of the

Supreme Court of Ohio is reported at *State* v. *Richey*, 64 Ohio St. 3d 353, 595 N.E.2d 915 (1992). (App. C at 8A-51A). Reconsideration was denied on September 30, 1992.

Richey filed a timely petition for a writ of certiorari to this Court requesting review of the decision of the Supreme Court of Ohio in his direct appeal on or about March 3, 1993. This Court denied certiorari on March 22, 1993. Richey filed a petition for rehearing of his petition for writ of certiorari on April 16, 1993. That petition was also denied.

The Murnahan Petition

On April 5, 1994, Richey filed for reopening of his direct appeal pursuant to Ohio R. App. P. 26(b) and *State* v. *Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). Richey's Application for Reopening and the supporting Rule 26(b)(2)(d) statement of his new appellate counsel detailed numerous examples of his original appellate counsel's failure to represent Richey effectively in his direct appeal. The Court of Appeals nevertheless dismissed his application for reopening without allowing a full briefing and without addressing any of the merits of the issues raised in the Application for Reopening. Richey filed a timely appeal of the decision of the Court of Appeals to the Supreme Court of Ohio on March 23, 1995. In a *per curiam* opinion, the Supreme Court of Ohio affirmed the decision of the Court of Appeals, also without addressing the merits of any of Richey's claims.

REASONS FOR GRANTING THE WRIT

I. The Ohio Court's Failure to Provide Meaningful Review of the Merits of Richey's *Murnahan* Petition Requesting Reopening of His Direct Appeal on the Basis of Ineffective Assistance of Appellate Counsel Violated His Right to Due Process of Law Under the Sixth and Fourteenth Amendments of the United States Constitution.

Petitioner Kenneth T. Richey was denied effective assistance of appellate counsel in his first appeal as of right of his death sentence in the Ohio courts. Numerous prejudicial errors occurred at his trial that were not addressed, or were insufficiently address, in his direct appeal because of the constitutionally deficient performance of his prior appellate counsel. Pursuant to the procedure provided by the State of Ohio, Richey seeks to reopen the direct appeal process. Both the Ohio Court of Appeals and the Supreme Court of Ohio refused, without any substantive analysis of the merits of Richey's claims, to allow reopening of his direct appeal. Instead, those courts ruled that Richey waived any right to consideration of the merits of his ineffective assistance of appellate counsel claims because those same ineffective counsel did not seek timely review of their own errors.

In Ohio, claims of ineffective assistance of appellate counsel are addressed through an "Application for Reopening," also known as a *Murnahan* petition, that is filed directly in the Ohio Court of Appeals. Rather than allowing defendants to raise the issue of ineffective assistance of appellate counsel as part of the defendant's post-conviction review, the State of Ohio has created this specific mechanism for bringing a claim of ineffective assistance of appellate counsel. *State* v. *Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). Under this procedure, set forth in *State* v. *Murnahan*, 63 Ohio St.3d 60,

584 N.E.2d 1204 (1992), and codified in Ohio R. App. P. 26(B), an Application for Reopening of the direct appeal on the basis of appellate counsel's ineffective representation is separate from other post-conviction claims, and is made directly to the Court of Appeals. Ohio provides 90 days from the date of entry of the Court of Appeals' decision in the direct appeal for a defendant to file a *Murnahan* petition. Ohio R. App. P. 26(B).

In the instant case, the journalization of the Court of Appeals' judgment affirming Richey's conviction and death sentence occurred on December 28, 1989 and the Appellant's Application for Reopening was filed on April 5, 1994. While this was after the ninety-day period provided for in the *Murnahan* procedure, Appellate Rule 26 specifically provides that an applicant may file an Application for Reopening after ninety days if he can show good cause for filing at a later time. In the instant case, there was "good cause" within the meaning of Ohio R. App. P. 26(B)(1) for the late filing. From December 28, 1989 through March, 1994, the same appellate counsel whose ineffectiveness was the basis for the Application for Reopening continued active service as Richey's counsel. *See, e.g.*, Notice of Withdrawal, executed and filed by Richey's prior appellate counsel on April 4, 1994. Plainly, prior appellate counsel could not have been expected to argue their own ineffectiveness. *State* v. *Cole*, 2 Ohio St.3d 112, 113 n.1 (1982).

The Ohio Court of Appeals for the Third Judicial District, Putnam County, and the Ohio Supreme Court have nevertheless refused to consider the merits of Richey's *Murnahan* petition. In dismissing Richey's application for reopening without allowing a full briefing, the Court of Appeals held that Richey's application for reopening "was not filed within ninety days of journalization of the appellate judgment as required by App. R. 26(B)(1);" and that "defendant's explanation for the delay, that

he was represented by the same appellate counsel for the past four years, fails to show good cause for the application being filed untimely." Without further analysis, the Court of Appeals concluded that "several of the issues were waived at trial, some were precluded by settled law and several are merely restatements of issues" that had already been addressed by the courts. *State* v. *Richey*, case no. 12-87-2, journal entry, January 4, 1995 (App. B at 5A). The Court of Appeals did not address the merits of the issues raised in the Application for Reopening — most of which had never been presented before because of the ineffective assistance of Richey's prior appellate counsel. The Court of Appeals' reliance on "waiver" in these circumstances is particularly troubling as prior counsel's failure to provide Richey with effective assistance is precisely the problem raised in Richey's Application for Reopening. It is as if Ohio were saying, "We will give you a procedure to remedy ineffective assistance of appellate counsel, but only if you either change counsel immediately or rely on your prior attorneys to recognize their own ineffectiveness." If this is indeed Ohio law, Richey should have been so notified at a time when he could make an intelligent choice to preserve his rights.

Richey filed a timely appeal of the decision of the Court of Appeals to the Supreme Court of Ohio on March 23, 1995. In a *per curiam* opinion, the Supreme Court of Ohio affirmed the decision of the Court of Appeals "for the reasons stated in its opinion" and did not address the substance of any of Richey's claims.

As this Court has held in the past, states must provide a method for vindicating the denial of federal constitutional rights. The failure of a state to do so is a violation of due process. *Young* v. *Ragen*, 337 U.S. 235 (1949); *Case* v. *Nebraska*, 381 U.S. 336 (1965). The Ohio appellate courts are "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Evitts* v. *Lucey*, 469 U.S.

387, 393 (1985) (quoting *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956)), and therefore, "the procedures used in deciding appeals" in Ohio "must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, 469 U.S. at 393. The denial of Richey's right to receive effective assistance of counsel in his first appeal as of right in the Ohio state courts violated his federal constitutional rights. While Ohio purports to provide a mechanism for the review of ineffective assistance of appellate counsel, the application of Ohio's *Murnahan* procedure in this case has foreclosed Richey's ability to seek review of his claims of ineffective assistance of appellate counsel and therefore is in itself unconstitutional.

II. The Ineffective Assistance of Petitioner's Prior Appellate Counsel Violated His Right to Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments of the United States Constitution.

Richey presented twenty-two "assignments of error" in his Application for Reopening to the Ohio Court of Appeals. While all of the errors presented in the Application demonstrate the constitutionally deficient assistance of his prior appellate counsel, this petition focuses on six of those arguments.

1. *Prior appellate counsel failed to challenge the fact that the three-judge panel convicted Richey of a different crime than the crime that was charged in the Bill of Particulars, pursued by the State at trial, and against which Richey prepared and presented his defense.*

The Indictment charged Richey with aggravated murder with a specific intent to kill Cynthia Collins. In the Bill of Particulars,

however, the State set forth its transferred intent theory under which the case was tried — that Richey had intended to kill either Candy Barchet, his ex-girlfriend, and/or Mike Nichols, her new boyfriend, and that this intent was transferred to Cynthia Collins, who actually died in the fire. The State's entire case and Richey's defense were based on the transferred intent theory. Indeed, the State conceded at oral argument before the Ohio Supreme Court that there was no evidence that Richey intended to kill Cynthia Collins. The three-judge panel found Richey guilty of aggravated murder and stated in the Verdict Form that he had "formed the specific intent to cause the death of another, to wit, Cynthia Collins." Verdict Form Re: Count I (App. D at 52A). Conviction for aggravated murder requires a finding of specific intent to kill. O.R.C. § 2903.01(D).

The three-judge panel's finding effectively ambushed Richey, who had prepared his defense against one charge only to be convicted of another. This is prejudicial *per se*. *See, e.g.*, *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948) ("it is as much a violation of due process to send an accused to prison following conviction on a charge on which he was never tried as it would be to convict him upon a charge that was never made"); *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937) ("conviction upon a charge not made would be a sheer denial of due process."); *Commonwealth* v. *Wadley*, 169 P. Super. 490, 83 A.2d 417 (1951), *cited in State* v. *Craft*, 52 Ohio App. 2d 1, 6 n.3, 367 N.E.2d 1221, 1225 n.3 (1977). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by *that charge*, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole*, 333 U.S. at 201 (emphasis added). Richey is entitled to an opportunity to present his defense to the charge of which he was convicted, aggravated murder with a specific intent to kill Cynthia Collins. The failure of prior

appellate counsel even to identify this issue was ineffective assistance of counsel in violation of Richey's constitutional rights.

2. *Prior appellate counsel's failure to review the Verdict Form and the Bill of Particulars adequately to recognize the palpable and prejudicial difference between them fell far below the objective reasonable standard set forth in* Strickland *v.* Washington, *466 U.S. 668 (1984) for evaluating ineffective assistance of counsel claims.*

Very few documents were relevant to Richey's direct appeal and none more so than the Bill of Particulars, which set forth the charges upon which he was tried and against which he defended, and the Verdict Form, which set forth the basis of his conviction. Nothing is more fundamental than that a conviction must match the charges. *See, e.g., Cole*, 333 U.S. at 201; *De Jonge*, 299 U.S. at 362. While the Constitution does not require that appellate counsel consider every conceivable argument and review every conceivable document, effective assistance of appellate counsel must at least include a review of the charging documents: the Indictment and/or the Bill of Particulars, and the Verdict Form. Even if Richey's conviction of a different offense than that with which he was charged was not *per se* unconstitutional, appellate counsel's failure to raise the issue was constitutionally ineffective assistance of counsel.[1]

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[1] *Strickland* also requires a showing that counsel's ineffectiveness prejudiced the defendant, *i.e.*, that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694. Here there is little doubt that the result would be different if Richey were defending against a charge of aggravated murder with the specific intent to kill Cynthia Collins. First, Richey would present evidence to refute any intent to kill Cynthia Collins — evidence he did not present at his first trial because he was defending against a different charge and lack of intent to kill Cynthia Collins was neither relevant nor material to that charge. More important, even the State concedes there is no evidence that Richey intended to kill Cynthia Collins.

The only evidence of what the Trial Court actually did, the Verdict Form, defeats any inference that the Court "found" Richey guilty on the theory of transferred intent. In fact, the Verdict Form expressly states that "the defendant formed the specific intent to cause the death of another, to wit, Cynthia Collins." That is the language of the original Indictment, but not the language of the Bill of Particulars under which Richey was tried and against which he prepared and presented his defense.

3. *Prior appellate counsel failed to challenge the fundamental variance between Richey's Indictment and the case that was tried against him, which constituted a constructive amendment of his indictment in violation of his right to indictment by a grand jury as guaranteed by Ohio Const., art. I, § 10.*

In Ohio, defendants are entitled to be tried on charges brought by a grand jury, not by the prosecutor. Ohio Const., art. I, § 10. This right to indictment by grand jury is "of paramount importance." *United States* v. *Beeler*, 587 F.2d 340, 342 (6th Cir. 1978), *cert. denied*, 454 U.S. 860 (1981). *See also United States* v. *Stirone*, 361 U.S. 212, 217 (1960). Richey was deprived of this right when the prosecution changed its theory of specific intent in the Bill of Particulars and tried Richey for specifically intending to kill Barchet and/or Nichols, not Cynthia, as the grand jury had charged. It is prejudicial *per se* to amend an indictment without going back to the grand jury. *United States* v. *Ford*, 872 F.2d 1231, 1235-36 (6th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990); *Beeler*, 587 F.2d at 342. *See also United States* v. *Joseph*, 597 A.2d 14, 17 (D.C. 1991), *cert. denied*, 112 S.Ct. 1988 (1992) (in a case remarkably similar to Richey's, the court ruled that trying a defendant on a transferred intent theory, where a grand jury

indictment had charged him with intending to kill the same person he allegedly assaulted, violated defendant's right to indictment by a grand jury).[2]

The State urged the Ohio Supreme Court to ignore the Verdict Form because "there is no requirement that transferred intent or specific intent be listed in the verdict form." State's Merit Brief at 10. Whether the three-judge panel was required to specify its finding in the verdict form is entirely beside the point. The point is that to convict Richey of aggravated murder, the panel *was* required to make a finding of specific intent to kill, O.R.C. § 2903.01(D), and it *was* required to make such a finding consistent with the charges against Richey. The only evidence we have of what the panel found is what it wrote in the Verdict Form: that Richey "formed the specific intent to cause the death of another, to wit, Cynthia Collins."[3] The Court cannot ignore the only evidence of what the panel found on a fundamental element of the offense.

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[2] In *Joseph*, defendant's conviction was saved from reversal only because defendant had not been convicted of assault with intent to kill, but was convicted merely of a lesser included offense which did not include the intent element that had been constructively amended by the prosecution and the court. 597 A.2d at 17.

[3] Moreover, there is evidence that the panel intended precisely what it wrote. Although the State apparently believes the express reference in the Verdict Form to a specific intent to kill Cynthia Collins was simply a mistake, the panel dismissed the unrefuted evidence that Richey had actively attempted to save Cynthia's life, at risk to his own, because of "the unrefuted evidence that the defendant pulled the [smoke detector] from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise." Merit Brief at 20. Although there was no evidence that Richey disabled the smoke detector, *id.*, the panel's conclusion is further evidence that it believed Richey had the specific intent to kill Cynthia.

4. *Prior appellate counsel failed to challenge the fact that to the extent the three-judge panel found Richey guilty as charged in the Bill of Particulars of the specific intent to kill Barchet and/or Nichols, the Verdict was ambiguous and in violation of his right to a unanimous verdict.*

The Bill of Particulars charges Richey with aggravated murder with the specific intent to kill "Candy Barchet and/or Mike Nichols." Because specific intent to kill is an essential element of the offense of aggravated murder, O.R.C. § 2903.01(D), the three-judge trial panel had to agree unanimously on specific intent. *See Schad* v. *Arizona*, 501 U.S. 624, 636 (1991) (trier of fact must be unanimous about each element of the offense). The Bill of Particulars, however, allowed the judges to convict Richey if they believed he had specific intent to kill either Barchet *or* Nichols. Thus, the panel could have been non-unanimous on this essential element of the offense, with some judges finding specific intent to kill Barchet but not Nichols and others finding intent to kill Nichols but not Barchet.

This possibility violated Richey's constitutional right to a unanimous verdict on each essential element of the offense. *See Schad*, 501 U.S. at 636, 651 ("We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts.") (Scalia, J., concurring); *United States* v. *Holley*, 942 F.2d 916, 927 (5th Cir. 1991) (reversible error found where the "single count as submitted to the jury embraces two or more separate offenses, though each be a violation of the same statute"). In fact, the "and/or" formulation employed by the State here was specifically rejected in *State* v. *Lyons*, 412 S.E.2d 308 (N.C. 1991):

> [T]he "and/or" instructions permitted four possible verdicts — 1) guilty of assault on Douglas Jones; 2) guilty of assault on Preston Jones; 3) guilty of assault

> on both; or 4) guilty of assault on Douglas in the view of some jurors, while guilty of assault on Preston in the view of others. The instructions thus were fatally ambiguous because the jury could have returned a verdict of guilty without all twelve jurors agreeing that defendant assaulted a particular individual. For example, six jurors could have found that defendant secretly assaulted Douglas Jones while the other six found that defendant assaulted Preston Jones.

Id. at 314. There is no difference between the jury instructions in *Lyons*, on which the jury based its finding, and the Bill of Particulars here, on which the three-judge panel based its finding (if the panel actually found Richey guilty of the charge in the Bill of Particulars, *see* II, part 1, *supra*). Because specific intent was an essential element of Richey's aggravated murder charge, and it is impossible to determine whether all three judges agreed on whom Richey intended to kill, Richey's aggravated murder verdict was rendered in violation of Richey's right to a unanimous verdict.

The State misread *Schad*, and erroneously argued to the Ohio Supreme Court that Ohio's "long history of applying transferred intent" is somehow relevant. State's Merit Brief at 14. Richey does not challenge the application of transferred intent, merely the State's attempt to convict him in a single charge on either of two theories of transferred intent. Here, unlike *Schad*, which concerned "not independent elements of the crime, but rather . . . mere means of satisfying a single *mens rea* element," specific intent to kill another is a statutorily defined essential element of the offense. O.R.C. § 2903.01(D). Therefore, while the trial panel could have properly convicted Richey on a transferred intent theory, it had to agree unanimously on a single theory of transferred intent, not compromise

on either of two theories — that Richey intended to kill Barchet or that he intended to kill Nichols. *See Schad*, 501 U.S. at 636. The State's use of the "and/or" formulation makes it impossible to determine whether there was the required unanimous verdict.

5. *Prior appellate counsel failed to challenge the application of the doctrine of transferred intent to Richey's indictment for aggravated murder under O.R.C. § 2903.01(B).*

By way of O.R.C. § 2903.01(D), the legislature removed application of the doctrine of transferred intent from aggravated murder cases under O.R.C. § 2903.01(B). The application of the transferred intent doctrine in Richey's case violated rights guaranteed to Richey by O.R.C. § 2903.01(D), U.S. Const., amends. V, VI, VIII, IX & XIV and Ohio Const., art. I, §§ 1, 2, 9, 10, 16 & 20. Prior appellate counsel missed this issue entirely. As a result, the Court of Appeals affirmed the conviction of Kenneth Richey on a transferred intent theory — that he intended to kill one person but killed a different person — despite the plain language of O.R.C. § 2903.01(D) that a defendant cannot be convicted of aggravated murder under § 2903.01(B) unless the prosecution proves that he "specifically intended to cause the death *of the person killed*." (Emphasis added.)[4] *See State* v. *Sowell*, 39 Ohio St.3d 322, 331-32, 530 N.E.2d 1294 (1988), *cert. denied*, 490 U.S. 1028 (1989) (acknowledges that the 1981 amendment to O.R.C. § 2903.01 that added subsection (D) removed transferred intent from application to aggravated murder charges under subsection (B), although it did not affect the applicability of that doctrine to subsection (A) offenses); *State* v. *Mullins*, 76 Ohio App.

[4] It is undisputed that Richey did not intend to cause the death of Cynthia Collins, who was "the person killed."

3d, 633, 636-37, 602 N.E.2d 769, 771-72 (1992) (the 1981 amendment to O.R.C. § 2903.01 removed the application of transferred intent from subsection (B) aggravated murder cases).

6. *Prior appellate counsel failed to challenge the trial court's error in informing Richey on December 12, 1986, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day, thereby depriving him of his rights under the federal and state constitutions and Ohio law.*

The right to a jury trial is a fundamental cornerstone of our constitutional system of civil and criminal jurisprudence. *Burch* v. *Louisiana*, 441 U.S. 130 (1979); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). In fact, the right to a jury trial is so fundamental that courts include it among those rights which are entitled to exceptional procedures to ensure that a defendant truly wishes to surrender them. One such safeguard is the requirement that a defendant must personally relinquish such rights through a *knowing, voluntary and intelligent* waiver. *Adams* v. *United States*, 317 U.S. 269 (1942); *see also Faretta* v. *California*, 422 U.S. 806 (1975). Pursuant to O.R.C. § 2945.05, a waiver of trial by jury by a criminal defendant "may be withdrawn by the defendant *at any time* before the commencement of the trial." (Emphasis added.)

Despite this statutory language, the presiding judge (Corrigan, J.) told Richey in open court nearly one month before trial that if he was going to withdraw his jury waiver he would have to do so that day, *i.e.*, December 12, 1986. *See* Transcript of Proceedings, dated December 12, 1986, at pp. 15-16. (A. M).[5]

[5] Richey was prejudiced by the trial court's inaccurate statement of the law, and he would have withdrawn his jury waiver had he known of his right to do so up

In a recently decided case, *State* v. *Haight*, the Ohio Court of Appeals for the Tenth Appellate District emphasized the need to ensure that a defendant's fundamental right to a trial by jury, particularly in a capital case, is not undermined in any way. The Court of Appeals also specifically held that a defendant must not be misinformed by the court or his attorneys with respect to that right. *State* v. *Haight*, App. No. 93APA08-1133, November 15, 1994, slip op. at 5193-94, 5196-5201. Here, the trial judge misinformed Richey about his right to withdraw his jury waiver at any time before the commencement of trial. The trial court's error also violated Richey's federal due process rights. *See, e.g., Evitts* v. *Lucey*, 469 U.S. 387, 401, *reh'g denied*, 470 U.S. 1065 (1985) ("[w]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, the Due Process Clause.").

CONCLUSION

For all the foregoing reasons, and the reasons set forth in Richey's Brief to the Supreme Court of Ohio, Richey respect-

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until the time of trial. Richey recognized that proof of prejudice and proof that Richey would have withdrawn his jury waiver might require evidence *de hors* the record. Accordingly, Richey requested that the Ohio appellate courts remand to the trial court to supplement the record.

fully requests that this Court issue a writ of certiorari to review the denial of Richey's Application for Reopening by the Ohio Supreme Court.

Respectfully submitted,

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November 28, 1995

APPENDIX.

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APPENDIX A.

73 Ohio St.3d 523

THE STATE of Ohio, Appellee,

v.

RICHEY, Appellant.

No. 95-374.

Supreme Court of Ohio.

Submitted June 21, 1995.

Decided Aug. 30, 1995.

Defendant, who was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangering, and sentenced to death, filed application to reopen his appeal, alleging that he was denied effective assistance of counsel before Supreme Court in his application for rehearing. The Court of Appeals, Putnam County, denied application, and defendant appealed. The Supreme Court held that defendant had no constitutional right to counsel on appeal to Supreme Court.

Affirmed.

Wright, J., dissenting statement.

Criminal Law 1077.3

Defendant had no constitutional right to counsel on appeal to Supreme Court, as required to appeal on basis of ineffective assistance of counsel, since appeal to Supreme Court was not first appeal as of right. U.S.C.A. Const.Amend. 6.

Appellant, Kenneth T. Richey, was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangering, and sentenced to death in 1987. The court of appeals affirmed the convictions and sentence. *State* v. *Richey* (Dec. 28, 1989), Putnam App. No. 12-87-2, unreported, 1989 WL 156561. On direct appeal as of right, we also affirmed. *State* v. *Richey* (1992), 64 Ohio St.3d 353, 595 N.E.2d 915, *certiorari denied, Richey* v. *Ohio* (1993), 507 U.S. ___, 113 S.Ct. 1592, 123 L.Ed.2d 157.

In April 1994, Richey filed with the court of appeals an application to reopen his appeal under App.R. 26(B), alleging ineffective assistance of his appellate counsel. The court of appeals denied the application, finding that appellant had failed to establish good cause for not filing the application to reopen within ninety days from the journalization of the appellate judgment, as required by App.R. 26(B)(1) and (B)(2)(b). The court of appeals also held that appellant's twenty-two proposed assignments of error failed to raise any genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal.

Appellant appeals the denial to this court. Appellant also now submits propositions of law XXIII through XXV, asserting he was denied the effective assistance of appellate counsel in his appeal before this court.

Daniel R. Gerschutz, Putnam County Pros. Atty. for appellee.

Goodwin, Procter & Hoar, Paul E. Nemser (admitted pro hac vice), Kenneth J. Parsigian (admitted pro hac vice), Patricia A. Lipoma and Lisa M. Tittemore, Boston, MA; Porter, Wright, Morris & Arthur and Scott E. North, Columbus, for appellant.

PER CURIAM.

We affirm the decision of the court of appeals for the reasons stated in its opinion. Further, we reject appellant's additional propositions of law XXIII through XXV, asserting appellant was denied the effective assistance of counsel before this court in his application for rehearing. Appellant's 1992 appeal to this court was not a first appeal as of right; therefore, he had no constitutional right to counsel, and hence no constitutional right to effective assistance of counsel. *See State* v. *Buell* (1994), 70 Ohio St.3d 1211, 639 N.E.2d 110.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

WRIGHT, J., dissents.

WRIGHT, Justice, dissenting.

I dissent for several reasons, most of which are included within Justice Herbert R. Brown's dissent in *State* v. *Richey* (1992), 64 Ohio St.3d 353, 373, 595 N.E.2d 915, 931.

APPENDIX B.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

STATE OF OHIO,
PLAINTIFF-APPELLEE, CASE NO. 12-87-2

v.

KENNETH T. RICHEY, JOURNAL ENTRY
DEFENDANT-APPELLANT.

This cause comes before the court upon the application of defendant, Kenneth T. Richey, for reopening pursuant to App.R. 26(B) and *State* v. *Murnahan* (1992), 63 Ohio St.3d 60, the memorandum in opposition filed by the State of Ohio and defendant's "notice of supplemental authority."

Defendant's conviction and death sentence were affirmed by opinion and journal entry of this court on December 28, 1989, and by the Ohio Supreme Court on August 12, 1992. *See State* v. *Richey* (1992), 64 Ohio St.3d 353. Defendant's application for reopening was filed April 5, 1994.

The court finds that defendant's application was not filed within ninety days of the journalization of the appellate judgment as required by App.R. 26(B)(1). The court further finds that defendant's explanation for the delay, that he was represented by the same appellate counsel for the past four years, fails to show good cause for the application being filed untimely. App.R. 26(B)(1) and 26(B)(2)(b). *See also State* v. *Carter* (1994), 70 Ohio St.3d 642.

The court further finds that, notwithstanding the fatal procedural defect, the twenty-two assignments of error raised by defendant in his application for reopening fail to raise any genuine issue as to whether defendant was deprived of the

effective assistance of counsel on appeal. *Strickland* v. *Washington* (1984), 466 U.S. 668; App.R. 26(B)(5).

In support of his application, defendant presents affidavits of his prior appellate counsel, Ken Murray and Jane P. Perry, stating that they "did not think of" and "completely missed" the issues raised in the application's assignments of error one through fourteen and, though they raised the claim of ineffective assistance of trial counsel, through "oversight" they missed the particular deficiencies of trial counsel alleged in the application's assignment of errors fifteen and sixteen. The Supreme Court of the United States has long recognized that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. *Engle* v. *Isaac* (1982), 456 U.S. 107, 102.

Upon our review of the first sixteen assignments of error the court finds that several of the issues were waived at trial, some were precluded by settled law and several are merely restatements of issues addressed by this court and the supreme court on appeal. Clearly, without the benefit of hindsight, counsel could have reasonably decided that they could not add these issues without "burying good arguments in a verbal mound made up of strong and weak contentions." *See State* v. *Campbell* (1994), 69 Ohio St.3d 38, 53, citing *Jones* v. *Barnes* (1983), 463 U.S. 745, 753.

In regard to assignments of error seventeen through twenty-one of defendant's application, defendant admits that his appellate counsel addressed these issues in the direct appeal, but claims they did so on the basis of an "insufficient and/or incomplete record." Upon our review of the record and these assignments of error, the court finds no indication that an "insufficient and/or incomplete record" limited the argument or consideration given these issues in the direct appeal.

Finally, defendant asserts by his twenty-second assignment of error that his prior appellate counsel's ability to provide effective representation was undermined by a conflict of interest. By affidavit, Mr. Murray states that he deliberately presented the ineffective assistance of trial counsel claim "in a relatively weak fashion" because his superior at the Ohio Public Defender Commission told him not to raise the ineffective assistance claim. However, due to his resignation from the Public Defender Commission, Mr. Murray was not involved with defendant's appeal after his work on the merit brief. Ms. Perry states in her affidavit that she had no knowledge of the alleged conflict of interest and the record shows that she continued as counsel for the defense in this court and the Ohio Supreme Court.

Upon our review of the record, the court finds nothing to corroborate the allegation that a "conflict of interest" undermined the representation provided defendant in his appeal to this court. Furthermore, in regard to this assignment and all others which rely on the affidavits of Mr. Murray and Ms. Perry, the court finds that the unsubstantiated, self-serving allegations of appellate counsels' own ineffectiveness, without corroborating circumstances in the record, are insufficient to show a genuine issue as to whether defendant was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). To find otherwise would, in essence, license a conceivably deliberate and unethical strategy.

Accordingly, for the reasons set forth above, the court finds that defendant's application for reopening is not well taken and should be denied.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that defendant's application for reopening be, and the same hereby is, denied.

/s/_____

/s/_____

/s/_____

JUDGES

DATED: January 4, 1995

APPENDIX C.

64 Ohio St.3d 353

THE STATE of Ohio, Appellee,

v.

RICHEY, Appellant.

No. 90-338.

Supreme Court of Ohio.

Submitted March 17, 1992.

Decided Aug. 12, 1992.

Defendant was convicted before the Court of Common Pleas, Putnam County, of aggravated murder with specification alleging murder in the course of arson, aggravated arson, breaking and entering, and child endangering, and he appealed. The Court of Appeals affirmed, and defendant again appealed. The Supreme Court, Moyer, C.J., held that: (1) it was not plain error to admit into evidence threats which defendant made against prosecutor and witnesses; (2) evidence was sufficient to sustain conviction; and (3) death penalty was appropriate and proportionate when compared with similar felony-murder cases.

Affirmed.

Herbert R. Brown, J., dissented with opinion in which Sweeney and Wright, JJ., concurred.

1. Criminal Law 1036.1(3)

Even if it was improper to admit evidence of defendant's threats against prosecutor and witnesses in prosecution for murder committed in course of arson, there was no plain error; circumstantial evidence against defendant was compelling in light of his explicit threat that building would burn on that particular night, and his motive and opportunity to start the fire.

2. Criminal Law 637

No one should be tried while shackled, absent unusual circumstances; however, shackling is left to trial court's sound discretion.

3. Criminal Law 1166.11(3)

It was not prejudicial error to order that defendant's feet be shackled during trial, where defendant had repeatedly threatened to kill prosecutor and witnesses against him.

4. Criminal Law 1035(1)

Supreme Court was not required to consider argument that judges of panel in aggravated murder trial, having been persuaded at trial's outset by evidence of defendant's threats against prosecutor and witnesses that defendant was dangerous and ordering that his feet be shackled, should have disqualified themselves, where defendant accepted panel and did not raise issue at trial or before Court of Appeals.

5. Homicide 357(8)

Evidence concerning aggravated murder defendant's threats to kill prosecutor and witnesses against him could be considered during capital sentence deliberations, as threats were properly included in report of presentence investigation as evidence

relating to defendant's "history, character, and background." R.C. § 2929.04(B).

6. Criminal Law § 986.4(3)

Criminal wrongdoing, even without convictions, is part of an accused's social history and thus properly included in presentence investigation report (PSI). R.C. § 2929.04(B).

7. Criminal Law 1042

It was not plain error to include in presentence investigations (PSI) letter which defendant wrote while in pretrial custody in which he threatened to hunt down everyone involved in case until they were dead; court already knew that defendant had threatened prosecutor and trial witnesses, and evidence of additional threats made little difference and did not cause a miscarriage of justice.

8. Criminal Law 641.12(1)

Right to effective assistance of counsel includes access to defense experts, and state's use of such witnesses could infringe on accused's attorney-client privilege. U.S.C.A. Const. Amend. 6.

9. Criminal Law 641.12(1)

Defendant's right to effective assistance of counsel was not violated in prosecution for murder committed in course of arson when prosecutor called defense retained expert as a state witness, where expert did not disclose or rely upon any confidential communications, but based his testimony upon physical evidence, reports, and photographs of fire. U.S.C.A. Const. Amend. 6.

10. Criminal Law 1036.6

No plain error occurred when prosecutor called defense-retained expert as a state witness in prosecution for murder committed in the course of arson, since testimony of expert agreeing with opinion of state fire marshall that accelerants had been used in fire made no difference; fire marshall's testimony that fire had been caused by arson and accelerants was not otherwise contradicted.

11. Criminal Law 404.35

Carpet in victim's apartment was properly admitted into evidence in prosecution for murder committed in course of arson, notwithstanding that carpet had been taken to trash dump after fire; whether carpet, which revealed presence of gasoline and paint thinner, had been contaminated in trash dump went to weight of the evidence, not its admissibility.

12. Criminal Law 1169.2(7)

Any error in admitting carpet into evidence in prosecution for murder committed in the course of arson, on theory that carpet which revealed presence of gasoline and paint thinner had been contaminated by its placement in trash dump, was harmless; other evidence established that arsonist had used accelerants.

13. Criminal Law 412.2(2)

Police chief was not required to inform defendant of his constitutional rights when chief interviewed defendant only as possible witness to fire, when defendant was not under arrest or in custody.

14. Criminal Law 412.2(5)

Defendant's Sixth Amendment rights were not violated by introduction of evidence of threats he made against prosecutor and witnesses during pretrial confinement while he was conversing with deputies, where defendant initiated the conversations and also waived his right to have a lawyer present. U.S.C.A. Const. Amend. 6.

15. Criminal Law 260.11(2)

In a bench trial, trial judges are presumed to rely only upon relevant, material, and competent evidence, in arriving at their judgments.

16. Criminal Law 260.11(6), 720(9)

Prosecutor did not commit crucial error in murder prosecution when he referred to defendant as a sociopath or psychopath, as reference was a fair inference based on the evidence; moreover, it was not prejudicial where trial was before a panel of judges.

17. Criminal Law 720(9)

Prosecutor's comments about why accelerants had not shown up on defendant's clothing constituted fair comment in prosecution for murder committed in course of arson.

18. Criminal Law 720(6)

Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom.

19. Criminal Law 260.11(6)

Prosecutor's references to helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial in bench trial for murder committed in course of arson.

20. Homicide 235

Evidence was sufficient to sustain conviction for aggravated murder committed in course of arson; defendant made threats to burn apartment building three hours prior to fire in apartment, and expert witnesses asserted that fire had been deliberately started, with gasoline and paint thinner used as accelerants; moreover, evidence established defendant's intention to kill people in building, and fact that intended victims escaped harm, and that innocent child was killed instead, did not alter defendant's legal and moral responsibility under doctrine of transferred intent.

21. Criminal Law 665(1)

No error occurred when trial court, after granting defendant's motion to separate witnesses, refused request that witnesses be sequestered from each other and admonished not to discuss their testimony after they testified; defendant failed to demonstrate any need for measures he requested inasmuch as he could question witnesses during cross-examination about any prior discussions. Rules of Evid., Rule 615.

22. Criminal Law 620(1)

The law favors joining multiple offenses in a single trial. Rules Crim. Proc., Rule 8(A).

23. Criminal Law 620(6)

Failure to sever breaking and entering charge from other offenses in prosecution for murder committed in course of arson was not error, notwithstanding defendant's claim that offense was not related to the arson; break-in was an integral part of the arson and part of "common scheme or plan" or "course of criminal conduct" under criminal procedure rule; break-in occurred at greenhouse located across street from apartment complex where arson occurred, in the hours before the arson; moreover, break-in explained defendant's access to gasoline and paint thinner, which other evidence demonstrated were the accelerants used in the arson. Rules Crim. Proc., Rule 8(A).

24. Criminal Law 620(6)

Defendant did not establish that his rights were prejudiced by failure to sever breaking and entering count from other counts in prosecution for murder committed in course of arson; evidence of the joined crime, the break-in, was simple and direct and thus not confusing; moreover, defendant was tried by panel of judges, who could not have confused the separate offenses. Rules Crim. Proc., Rule 14.

25. Constitutional Law 265
Criminal Law 1166(2)
Grand Jury 40

State's failure to record grand jury testimony did not violate defendant's due process and fair trial rights, so as to necessitate reversal; although defendant asserted on appeal for the first time that he needed transcripts to explore possible inconsistent statements by witnesses, he established no basis at trial for any particularized need, and his general assertions on appeal

did not establish particularized need; thus, defendant was not entitled to the transcripts, even if they existed, and error in failing to record the testimony was harmless. U.S.C. Const. Amends. 6, 14.

26. Criminal Law 651(1)

Statute authorizes view of crime scene, and trial court is vested with broad discretion in such matters. R.C. § 2945.16.

27. Criminal Law 1144.10

Court cannot presume prejudice from failure to record visit to a crime scene. R.C. § 2945.16.

28. Criminal Law 984(7)

Imposing separate sentences for aggravated murder committed in course of arson and aggravated arson did not violate sentencing statute and constitutional guarantees; comparing elements, aggravated murder and aggravated arson are not allied offenses of similar import within meaning of statute; aggravated murder requires purposely causing the death of another while committing one of nine specified felonies, of which aggravated arson is only one; moreover, aggravated arson does not require a purposeful killing, but only a substantial risk of physical harm by fire or explosion. R.D. § 2941.25; U.S.C. Const. Amend. 5.

29. Criminal Law 984(7)

Imposing separate sentences for aggravated murder and endangering a child did not violate sentencing statute and constitutional guarantees, as offenses have entirely different elements, and thus are not allied offenses of similar import. R.C. § 2941.25; U.S.C.A. Const. Amend. 5.

30. Criminal Law 986.2(1)

Courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents.

31. Homicide 358(1)

Trial Court in prosecution for aggravated murder did not err when it declined to give any weight to evidence of family background or to expert testimony that defendant suffered from borderline and antisocial personality disorders.

32. Homicide 357(4)

Behavior or personality disorder does not qualify as a "mental disease or defect within meaning of capital murder sentencing statute. R.C. § 2929.04(B)(3).

See publication Words and Phrases for other judicial constructions and definitions.

33. Homicide 357(4, 6, 7)

Death penalty was appropriate and proportionate for aggravated murder committed in course of arson; in torching apartment building at night, defendant jeopardized lives of others in addition to killing an innocent two-year-old child; fact that defendant killed unintended victim rather than intended victims did not alter his moral culpability under doctrine of transferred intent; moreover, his personality disorders did not rise to level of substantial impairment of capacity. R.C. § 2929.04(B)(3).

Around 4:15 A.M., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's second-floor apartment, killing Cynthia Collins, Hope's two-year-old

daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.

Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events lived in the Old Farm Village Apartments in Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15, and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 a.m., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying, "If I can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and

said Richey threatened to blow the place up since he had "learned how to do explosives" in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said, "Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying, "A Building was going to burn. . . ." Juanita Altimus, while just outside her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 a.m., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:30 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 a.m., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname]—she's asleep—but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 a.m., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming

that a child was inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would. . . ." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, " It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from the K & J Greenhouse for Candy, and police found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips

from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview.

In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment; he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.

A grand jury indicted Richey for aggravated murder with a specification alleging murder in the course of arson, aggravated arson, breaking and entering (the greenhouse), involuntary manslaughter, and child endangering. A panel of three judges convicted Richey of all charges, save the manslaughter charge, which was dropped. Following a presentence investigation, mental evaluation, and mitigation hearing, the panel sentenced Richey to death for aggravated murder and consecutive prison terms for the other offenses. The court of appeals affirmed the convictions and sentence.

Daniel R. Gerschutz, Pros. Atty., for appellee.

Randall M. Dana, Ohio Public Defender, Jane P. Perry and Kevin L. Fahey, Columbus, for appellant.

MOYER, Chief Justice

We have received appellant's twenty-three propositions of law, independently assessed the evidence relating to the death sentence, balanced the aggravating circumstance against the mitigating factor, and compared the sentence to those imposed in similar cases. As a result, we affirm the convictions and sentence of death.

I

Evidence of Threats

[1] In his first proposition of law, Richey argues that admitting evidence of his threats destroyed the constitutionally required reliability and fairness of his trial and sentence. This evidence included the following. Richey told Deputy Roy Sargent on November 19 that "Randy Bassinger [the prosecutor] was a dead man" and that "whoever testified against him had better hope he's six feet under." On August 17, Richey told Deputy Mike Ball to take a message to Randy Bassinger, "that when he got out he was going to cut his throat."

While in pretrial confinement, Richey initiated conversations with his jailers about the offenses charged against him. Richey's threats were simply part of those conversations. Although Richey moved to suppress these statements, he did not object specifically to evidence of the threats. Hence, the issue is waived except for plain error. *State* v. *Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364; *State* v. *Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

Richey's threats reflect a consciousness of his guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses. *See State* v. *Eaton* (1969), 19 Ohio St.2d, 145, 48 O.O.2d 188, 249 N.E.2d 897 (flight from justice may indicate a consciousness of guilt);

Cleveland v. *McNea* (1952), 158 Ohio St. 138, 142, 48 O.O. 68, 70, 107 N.E.2d 201, 203 (suppressions of adverse evidence constitutes a prejudicial circumstance of much weight); *State* v. *Huffman* (1912), 86 Ohio St. 229, 99 N.E. 295; *Moore* v. *State* (1853), 2 Ohio St. 500; 2 McCormick on Evidence (4 Ed. 1992), Sections 263, 265; 2 Wigmore on Evidence (Chadbourn Rev. 1979 and 1991 Supp.), Sections 273, 276 and 278.

However, even if we were to find the evidence improper, no plain error is apparent. The circumstantial evidence against Richey was compelling in view of his explicit threat that Building "A" would burn tonight, his motive and opportunity to start the fire, and the other circumstances." In *State* v. *Bayless* (1976), 48 Ohio St.2d 73, 106, 2 O.O.3d 249, 267, 357 N.E.2d 1035, 1056, vacated in part (1978), 438 U.S. 911, 98 S.Ct. 3135, 56 L.Ed.2d 1155, we found evidence about threats against deputies to be harmless error even though wrongfully admitted, over objection, in an aggravated murder prosecution. Additionally, in a bench trial, the court must be presumed to have " 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.' " *State* v. *Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759.

In Proposition of Law II, Richey argues that the judges of the panel, having been persuaded at the trial's outset that Richey was dangerous, should have disqualified themselves. At the trial, the prosecutor moved that Richey's hands and feet be shackled. However, the panel ordered Richey's feet shackled but left his hands free.

[2,3] Admittedly, "no one should be tried while shackled, absent unusual circumstances." *State* v. *Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311, 318. However, shackling is left to the trial court's sound discretion. *State* v. *Woodards* (1966), 6 Ohio St.2d 14, 23, 35 O.O.2d 8, 13, 215 N.E.2d 568, 576. In this case, defense counsel did not object to

the shackling, and Richey had repeatedly threatened to kill the prosecutor and witnesses against him. Under the circumstances, we find no prejudicial error. Compare *Woodards* v. *Cardwell* (C.A.6, 1970), 430 F.2d 978, with *Kennedy* v. *Cardwell* (C.A.6, 1973), 487 F.2d 101; Annotation (1979 and 1991 Supp.), 90 A.L.R.3d 17. On its own motion, the court ruled that deputies could wear firearms and could search anyone entering the courtroom, but those orders reflected routine housekeeping functions. *See* R.C. 2945.03.

[4] Even though the judges had been exposed to evidence about Richey's threats, they did not need to recuse themselves. Richey accepted the panel and raised this issue neither at trial nor before the court of appeals. Hence, we need not consider this issue. *State* v. *Williams, supra*; *State* v. *Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772.

State v. *Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, is distinguishable. *Gillard* involved a ruling on *ex parte* evidence in a closed hearing under Crim.R. 16(B)(1)(e). Also, *Gillard* did not announce a *per se* prejudice rule. In this case, as in *Gillard*, the trial judges are presumed not to have improperly used the evidence about threats in their subsequent deliberations. *State* v. *Post, supra*. Nothing in the record indicates they did so, and the evidence of guilt is otherwise compelling. *See* discussion, Part V.

[5,6] Since the evidence about Richey's threats was included in the report of the presentence investigation, it could be considered during sentence deliberations. Such evidence relates to an accused's "history, character, and background." R.C.2929.04(B). Criminal wrongdoing, even without convictions, is part of an accused's social history and thus properly included in a presentence investigation report. *State* v. *Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895, 914; *State* v. *Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, paragraph one of the syllabus.

II

Presentence Investigation

[7] In Proposition of Law III, Richey argues that the presentence investigation report ("PSI") erroneously included a letter he wrote. The trial court had earlier suppressed that letter as not relevant at the guilt or penalty phase.

While in pretrial custody, Richey wrote to a friend in Scotland that police in the United States did not scare him. The letter was quoted in the PSI as follows:

> "If one ever pulls a gun on me he'd better shoot to kill. . . . Remember that day when I shot Gog's in the head with your gun, I laughed so hard I almost ripped my sides! [If the police in Scotland] ever found out about ½ the stuff we done they'd bring back the death penalty just for us! . . . If they just give me prison time they better hope to hell I die in there, cause when I get out I won't stop hunting them all down until everyone who is involved in this case is dead!"

Arguably that letter was relevant to the sentencing decision. A PSI is not limited by the strict rules of evidence. *See State* v. *Greer* (1988), 39 Ohio St.3d 236, 254, 530 N.E.2d 382, 402-03. This PSI related to Richey's "history, character, and background." R.C. 2929.04(B); *State* v. *Hutton, supra.*

Moreover, having failed to object to the PSI, or the letter's inclusion in the PSI, Richey waived any issue related to the PSI except for plain error. *State* v. *Cooey, supra*, 46 Ohio St.3d at 35, 544 N.E.2d at 914; *State* v. *Long, supra.* No plain error was involved since the court already knew Richey had threatened the prosecutor and the trial witnesses. *See* Part I. Hence, evidence of these additional threats made little difference and did not cause a miscarriage of justice.

III

Other Evidence Issues

In his fourth proposition of law, Richey argues that his rights to a fair trial and effective counsel were violated when the prosecutor called a defense-retained expert as a state witness. Dubois, a consulting engineer, agreed with the State Fire Marshal's opinion that accelerants had been used in the fire.

[8] The right to the effective assistance of counsel includes access to defense experts, and the state's use of such witnesses could infringe an accused's attorney-client privilege. *See Miller* v. *Dist. Ct. of Denver* (Colo. 1987), 737 P.2d 834; *State* v. *Mingo* (1978), 77 N.J. 576, 392 A.2d 590; but, *see, Noggle* v. *Marshall* (C.A.6, 1983), 706 F.2d 1408; *Granviel* v. *Estelle* (C.A.5, 1981), 655 F.2d 673; *State* v. *Pawlyk* (1990), 115 Wash.2d 457, 800 P.2d 338.

[9] The prosecutor's use of a defense expert does not violate an accused's Sixth Amendment right to counsel. *Noggle, supra*. Although the prosecutor's use of a defense expert may violate an accused's attorney-client privilege, Dubois did not disclose or rely upon any confidential communications here. Instead, Dubois based his testimony upon the physical evidence, reports, and photographs of the fire.

[10] By not objecting, Richey waived any attorney-client privilege as to Dubois. Moreover, no plain error exists; no manifest miscarriage of justice occurred because Dubois's testimony made no difference. The Fire Marshal's testimony that the fire had been caused by arson and accelerants was not otherwise contradicted. In such cases, the record must reflect prejudice before reversal is required. *See Hutchinson* v. *People* (Colo. 1987), 742 P.2d 875, 886; *United States* v. *Talley* (C.A.9, 1986), 790 F.2d 1468; *State* v. *Mingo*, 77 N.J. at 588, 392 A.2d at 596.

[11] In Proposition of Law VI, Richey argues that the admission of the Collins carpet into evidence violated his rights because the physical integrity of the carpet had been compromised. Two deputy sheriffs recovered the Collins carpet from a trash dump on July 1, where it had been taken, unknown to investigators, after the fire. Two samples from this carpet revealed the presence of gasoline and paint thinner.

The evidence firmly established that the carpet admitted into evidence was the carpet from the Collins apartment. Authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). The possibility of contamination goes to the weight of the evidence, not its admissibility. "A strict chain of custody is not always required in order for physical evidence to be admissible." *State* v. *Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 532, 415 N.E.2d 303, 308; *see State* v. *Downsf* (1977), 51 Ohio St.2d 47, 63, 5 O.O.3d 30, 38, 364 N.E.2d 1140, 1150.

[12] Moreover, other evidence established that the arsonist had used accelerants, including dominant pour patterns to the burning on the wood deck and living room concrete. An accelerant was also found in wood chips from the deck floor. Thus, even if the rug had been wrongfully admitted, other evidence of arson rendered any error harmless. Crim.R. 52(A).

In Proposition of Law IX, Richey argues that evidence of his pretrial statements violated his *Miranda* rights and Sixth Amendment right to counsel. Richey made several statements to police about the fire, denying any culpability. In one statement, Richey admitted he had broken into a greenhouse across the street and stolen some potted plants. The trial court denied Richey's motion to suppress, finding no constitutional violations.

[13] Richey complains first about admission of a statement he made to Police Chief Miller on the morning of the fire. How-

ever, Miller initially interviewed Richey only as a possible witness to the fire, and Richey was not under arrest or in custody. Richey was free to leave as long as he stayed out of the fire fighters' way. Since no custodial interrogation occurred, Miller was not required to inform Richey of his constitutional rights. *See Oregon* v. *Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; *Minnesota* v. *Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409.

Even if a custodial interrogation occurred, any error would be harmless beyond a reasonable doubt. In this brief June 30 statement, Richey said nothing about how the fire started, and the statement could not have harmed him before the trier of fact.

Around noon, Miller interviewed Richey again, but Miller then advised him of his *Miranda* rights before securing a second statement. On July 1, Richey was advised of his rights twice when he was arrested.

[14] Richey further complains that his Sixth Amendment rights were violated by evidence about conversations he had while in pretrial confinement. On August 17, 1986, Richey threatened the prosecutor in a conversation with Deputy Mike Ball. On November 19, Richey made further threats against the prosecutor and witnesses in a conversation with Deputy Roy Sergeant. In neither case did the deputies initiate the conversation or question Richey.

The *Miranda* safeguards do not preclude admission of this evidence because Richey initiated the conversations and also waived his right to have a lawyer present. Hence, the trial court did not err in declining to suppress Richey's statements. *See Rhode Island* v. *Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297; *Oregon* v. *Bradshaw* (1983), 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405; *Connecticut* v. *Barrett* (1987), 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920.

IV

Prosecutorial Misconduct

[15] In Proposition of Law V, Richey argues that the prosecutor grievously erred in his final guilt-phase argument. However, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87. Accord *State* v. *DePew* (1988), 38 Ohio St.3d 275, 288, 528 N.E.2d 542, 556-57; *State* v. *Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642. Moreover, in a bench trial, trial judges are presumed to rely only upon relevant, material, and competent evidence, in arriving at their judgments. *State* v. *Post, supra*, 32 Ohio St.3d at 384, 513 N.E.2d at 759.

[16-18] The prosecutor did not commit crucial errors. The prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence. In any event, it was not prejudicial before a panel of judges. *State* v. *Post, supra*. The prosecutor's varied comments about why accelerants had not shown up on Richey's clothing also constituted fair comment. Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom. *State* v. *Stephens* (1970), 24 Ohio St.2d 76, 82, 53 O.O.2d 182, 185, 263 N.E.2d 773, 777; *see State* v. *Byrd* (1987), 32 Ohio St.3d 79, 82, 512 N.E.2d 611, 616.

[19] By referring to Richey's threats, the prosecutor referred to evidence in the record admitted without objection. The prosecutor's reference to the helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial. *See Payne* v. *Tennessee* (1991), 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720. Thus, Proposition of Law V is overruled.

V

Sufficiency of Evidence

[20] In Proposition of Law VII, Richey argues that the circumstantial evidence at trial did not establish his identity as the arsonist and killer of Cynthia Collins. Richey argues the evidence is insufficient because testing failed to show accelerants on his clothing. However, Richey may not have spilled any gasoline or paint thinner on his clothing when he set the fire, or at least not on portions of the clothing eventually tested. Alternatively, the fatigues seized by the police on July 1 may not have been those worn by Richey on June 29-30.

Richey challenges the accuracy of the times that Altimus gave for statements she heard. However, Altimus may have been simply confused about when she heard Richey. Richey argues that he could not have set the fire because he was intoxicated and had a splint on his hand. However, he could still use that bandaged hand, and the evidence about his intoxication was conflicting.

In a review for sufficiency, the evidence must be considered in a light most favorable to the prosecution. *Jackson* v. *Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State* v. *Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925, 730. ". . . [T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State* v. *DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Murder convictions can rest upon circumstantial evidence. *State* v. *Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, 1239; *State* v. *Apanovitch* (1987), 33 Ohio St.3d 19, 27, 514 N.E.2d 394, 402. Indeed, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. *State* v. *Lott* (1990), 51 Ohio St.3d 160, 167, 555 N.E.2d 293, 302. Accord *State* v. *Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

The evidence against Richey established that he was the killer and arsonist. Five days before the fire, Richey pulled a knife on Butler, who had just been in bed with Candy, and Richey had told Candy he would kill any new boyfriend she found. At the party, Richey was infuriated because Candy brought Nichols, kissed him repeatedly, and asked Nichols to spend the night with her. Dannenberger, Price, and Altimus all heard Richey say that Building "A" would burn that night, which Richey said more than once. The fire started three hours later.

The evidence shows that Hope Collins gave Richey access to her apartment and asked Richey to baby-sit Cynthia, and he agreed to do so. Moreover, Richey admitted to the police that he knew Cynthia was in her bedroom, since he had stopped to see her there during the day. Less than an hour after agreeing to baby-sit for her, Richey started the fire in Hope's apartment. Candy's apartment was immediately below Hope's apartment, and the latter's smoke detector had been ripped out of the ceiling and was hanging by the wires. Damage to the smoke detector may have delayed any warning about the fire.

Unrebutted expert witnesses asserted that the fire had been deliberately started, and that gasoline and paint thinner had been used as accelerants. Richey had access to a greenhouse where gasoline and paint thinner were stored; some of the gasoline and paint thinner could have been missing; and Richey admittedly had stolen plants from that greenhouse. Additionally, during the fire, Richey continued to challenge Nichols to a fight and reasserted to Candy that he would not let anyone else have her. To Altimus, the elderly neighbor, Richey bragged that he had done "a helluva good job" as he laughed and surveyed the fire damage.

The evidence also established Richey's intention to kill Candy and Nichols. Before the fire, Richey threatened Candy and any new boyfriend she would acquire. At the party, Richey

specifically threatened to burn Building "A." He then set the fire in a jealous rage directed at Candy and her new boyfriend. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State* v. *Johnson* (1978), 56 Ohio St.2d 35, 39, 10 O.O.3d 78, 80, 381 N.E.2d 637, 640; *State* v. *Lott, supra*, 51 Ohio St.3d at 168, 555 N.E.2d at 302.

The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State* v. *Sowell* (1988), 39 Ohio St.3d, 322, 332, 530 N.E.2d 1294, 1305. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State* v. *Solomon* (1981), 66 Ohio St.2d 214, 218, 20 O.O.3d 213, 216, 421 N.E.2d 139, 142.

Other states agree. Aside from a few states whose statutes require a different result, "there is a singular unanimity among the decisions in the overwhelming majority of the states that such a homicide 'partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander.'" *Gladden* v. *State* (1974), 273 Md. 383, 392, 330 A.2d 176, 181. Accord *State* v. *Julius* (1991), 185 W.Va. 422, 408 S.E.2d 1, and cases cited in *Gladden* and *Julius*.

In *Wareham* v. *State* (1874), 25 Ohio St. 601, 607, this court explained the reasons for this principle: "The purpose and malice with which the blow was struck is not changed in any degree by the circumstances that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was

directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions."

A verdict will not be reversed "where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State* v. *Eley* (1978), 56 Ohio St.2d 169, 10 O.O.3d 340, 383 N.E.2d 132, syllabus. In this case, substantial evidence existed to sustain all the elements of the offense charged, and the panel's verdict stands.

VI

Miscellaneous Guilt Phase Issues

[21] In Proposition of Law VIII, Richey argues that the trial court failed to minimize the risk of collusion among witnesses and that, hence, the guilty verdict was not reliable. At the trial, the court granted Richey's motion to separate witnesses in accordance with Evid.R. 615. Richey also asked that witnesses be sequestered from each other and admonished not to discuss their testimony after they testified. The trial court denied that motion, ruling that possible discussion among witnesses could be tested on cross-examination.

R.C. 2945.03 specifies the right of a trial judge in a criminal trial to control the trial proceedings. Orders relating to witnesses are entrusted to the sound discretion of the trial court.

At trial, Richey failed to demonstrate any need for the measures he requested. Richey could question witnesses during cross-examination about any prior discussions. Richey also fails to cite specific instances of preventable discussions, or any prejudice from the lack of such orders, or any authority requiring such orders. Thus, Proposition of Law VIII lacks merit.

[22,23] In Proposition of Law X, Richey argues that the trial court erred by not severing count three, the break-in at the K & J Greenhouse, from the other offenses. Richey argues that this offense was not related to the arson. However, the law favors joining multiple offenses in a single trial under Crim.R. 8(A). *See State* v. *Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State* v. *Torres* (1981), 66 Ohio St.2d 340, 343, 20 O.O.3d 313, 315, 421 N.E.2d 1288, 1290. The K & J break-in was an integral part of the arson and thus part of "a common scheme or plan" or "a course of criminal conduct" under Crim.R. 8(a). Richey broke into the K & J Greenhouse, located across the street from the apartment complex, in the hours before the arson. Moreover, the break-in explained Richey's access to gasoline and paint thinner, which other evidence demonstrates were the accelerants used in the arson.

[24] Even though joinder was possible, Richey argues that the trial court should have severed count three from the others under Crim.R. 14. However, Richey has the burden to establish prejudice to his rights in accordance with Crim.R. 14. *State* v. *Torres, supra*, syllabus; *State* v. *Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State* v. *Roberts* (1980), 62 Ohio St.2d 170, 175, 16 O.O.3d 201, 204, 405 N.E.2d 247, 251.

Richey failed to establish prejudice. Evidence of the joined crime, the break-in, was simple and direct and thus not possibly confusing. *See State* v. *Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State* v. *Franklin* (1991), 62 Ohio St.3d 118, 122 580 N.E.2d 1, 6. Moreover, the panel of judges could not have confused the separate offenses. *State* v. *Lott, supra*, 51 Ohio St.3d at 164, 555 N.E.2d at 298.

Additionally, evidence of that break-in would have been admissible, under Evid.R. 404(b), even if that offense had not been joined. Proof that Richey broke into the greenhouse established that he had the opportunity to discover and steal the paint

thinner and gasoline stored there. Access to these accelerants was also part of his preparation to burn Building "A." *See State* v. *Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180; *State* v. *Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682, 690. Proposition of Law X lacks merit.

[25] In Proposition of Law XIII, Richey argues that the state's failure to record grand jury testimony violated his due process and fair trial rights, necessitating reversal. Richey correctly points out that "[p]ursuant to Crim.R. 22 grand jury proceedings in felony cases must be recorded." *State* v. *Grewell* (1989), 45 Ohio St.3d 4, 543 N.E.2d 93, syllabus.

At trial, Richey expressed an interest in grand jury testimony only to avoid unnecessary voir dire of jurors. Richey subsequently waived a jury trial and therefore abandoned this basis for that request. On appeal, Richey asserts for the first time that he needed the transcripts to explore possible inconsistent statements by witnesses. However, Richey established no basis at trial for any particularized need, and his general assertions do not establish particularized need now. "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts . . . unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists. . . ." *State* v. *Greer* (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

Therefore, Richey was not entitled to the transcripts, even if they existed. The error in failing to record the testimony is harmless. *See State* v. *Grewell, supra*, 45 Ohio St.3d at 9, 543 N.E.2d at 98; *State* v. *Wickline* (1990), 50 Ohio St.3d 114, 122, 552 N.E.2d 913, 922.

In Proposition of Law XIV, Richey argues for reversal because the trial court failed to state essential findings under Crim.R. 12(E) when it denied Richey's motions to suppress his pretrial statements. However, Crim.R. 12(E) does not con-

trol because Richey did not request factual findings. "[I]n order to invoke the rule, the defendant must request that the court states its essential findings of fact in support of its denial of a motion." *State* v. *Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701, 718; *see Bryan* v. *Knapp* (1986), 21 Ohio St.3d 64, 21 OBR 363, 488 N.E.2d 142. Moreover, the evidence necessitated the trial court's decision not to suppress the statements. Any error would be harmless. *See* Part III.

In Proposition of Law XVI, Richey argues that his rights to a complete record, the effective assistance of counsel, and meaningful appellate review were compromised because the visit to the crime scene was unrecorded. However, the trial court asked counsel before the visit, "Do you have any problem waiving the presence of the court reporter?" The prosecutor said he did not, and defense counsel said nothing. At trial, neither counsel asked the court to describe the visit.

[26,27] R.C. 2945.16 authorizes a view of a crime scene, and the trial court is vested with broad discretion in such matters. *State* v. *Zuern* (1987), 32 Ohio St.3d 56, 58, 512 N.E.2d 585, 588. A view of a crime scene is neither evidence nor a crucial stage in the proceedings. *See State* v. *Tyler* (1990), 50 Ohio St.3d 24, 38, 553 N.E.2d 576, 593; *Snyder* v. *Massachusetts* (1934), 291 U.S. 97, 108-09, 54 S.Ct. 330, 333, 78 L.Ed. 674, 679-80. The trial panel must be presumed to know and apply that principle. *State* v. *Post, supra*. Furthermore, Richey has not supplemented the record, pursuant to App.R. 9(C) or 9(E), in an effort to show prejudice from the lack of recording. The court cannot presume prejudice from an unrecorded visit to a crime scene. *State* v. *Watson* (1991), 61 Ohio St.3d 1, 15, 572 N.E.2d 97, 109; *State* v. *Tyler, supra*, 50 Ohio St.3d at 38, 553 N.E.2d at 593.

VII

Ineffective Assistance of Counsel

In Proposition of Law XV, Richey argues that his counsel ineffectively represented him, thereby depriving him of his Sixth Amendment rights. Reversal on this ground requires that the defendant show, first, "that counsel's performance was deficient" and, second, "that the deficient performance prejudiced the defense" so as to deprive the defendant of a fair trial. *Strickland* v. *Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693.

Richey complains first that his counsel failed to object to evidence about his threats to the prosecutor and witnesses. However, this evidence was arguably admissible and, in any event, made no difference at trial. *See* Part I. Richey also complains that his counsel did not attempt to disqualify the trial panel. However, counsel's tactical choice not to do so was within the range of professional discretion and cannot be second-guessed on appeal. His counsel could also properly choose not to object to the presentence report. *See Strickland, supra*, at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

The prosecution's use of the defense's arson expert as a state witness made no difference in view of the uncontradicted evidence of arson and accelerants. Counsel had moved to suppress Richey's pretrial statements, and did not fail in any essential duty by not asking for findings under Crim.R. 12(E), since those statements were properly admitted into evidence. The trial court properly sentenced Richey on different counts; hence, his counsel did not perform deficiently by not objecting to the imposed sentence.

In sum, Richey's counsel continued to function as the "counsel" guaranteed him by the Sixth Amendment. Moreover, no reasonable probability existed "that, were it not for counsel's errors, the result of the trial would have been different." *State*

Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The prosecution had a strong case against Richey.

VIII

Constitutionality

We have previously rejected Richey's constitutional challenges in Propositions of Law XX and XXI to Ohio's proportionality review. *See State* v. *Jenkins* (1984), 15 Ohio St.3d 164, 176, 15 OBR 311, 321, 473 N.E.2d 264, 278; *State* v. *Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXII, Ohio's felony-murder statute is constitutional. *See State* v. *Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXIII, Ohio's law meets constitutional requirements for death penalty statutes. *State* v. *Combs* (1991), 62 Ohio St.3d 278, 291, 582 N.E.2d 1071, 1082; *State* v. *Steffen, supra*, 31 Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396; *State* v. *Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768.

IX

Sentencing Errors

[28] In Proposition of Law XI, Richey argues that imposing separate sentences for aggravated arson and aggravated murder violates R.C. 2941.25 and constitutional guarantees. In Proposition of Law X Richey pursues these same arguments seeking to overturn separate sentences posed for aggravated murder and endangering a child.

State v. *Blankenship* (1988), 39 Ohio St.3d 116, 117, 526 N.E.2d 816, 817, notes:

> "This court has set forth a two-tier test to determine whether two crimes with which a defendant is charged are allied offenses of similar import. In the first step, the elements of the two crimes are compared. . . . In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses." (Emphasis *sic.*) *See also, State* v. *Mitchell* (1983), 6 Ohio St.3d 416, 418, 6 OBR 463, 464, 453 N.E.2d 593, 594; *State* v. *Logan* (1979), 60 Ohio St.2d 1345, 1348.

When the elements are compared, aggravated murder and aggravated arson are not allied offenses of similar import within the meaning of R.C. 2941.25. Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated arson is only one. Moreover, aggravated arson does not require a purposeful killing; instead, it requires a substantial risk of physical harm by fire or explosion. Thus, "[t]he two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed." *State* v. *Moss* (1982), 69 Ohio St.2d 515, 520, 23 O.O.3d 447, 450, 433 N.E.2d 181, 186. *See, also, State* v. *Bickerstaff* (1984), 10 Ohio St.3d 62, 10 OBR 352, 461 N.E.2d 892; *State* v. *Willey* (1981), 5 Ohio App.3d 86, 5 OBR 200, 449 N.E.2d 471 (aggravated arson and involuntary manslaughter are separately punishable).

[29] Richey's Proposition of Law XII also lacks merit. Child endangering under R.C. 2919.22(A) and aggravated murder are not allied offenses of similar import. The elements of child endangering are the defendant's custody or control of a child under eighteen and his creation of a substantial risk to the health or safety of the child by violating a duty of care or protection. Aggravated murder is a purposeful killing in the

course of one of nine specified felonies, none of which is child endangering. These offenses have entirely different elements. *Cf. State* v. *Anderson* (1984), 16 Ohio App.3d 251, 16 OBR 275, 475 N.E.2d 492 (child endangering and felonious assault are not allied offenses of similar import.)

In Proposition of Law XVII, Richey complains the trial court erred in not giving any weight to relevant mitigation evidence. In Proposition of Law XIX, Richey argues the court of appeals failed to individually consider his particular character and family background.

Richey presented a variety of evidence concerning his personal history, character and background. Also, several mental health professionals concluded that Richey suffered from borderline and antisocial personality disorders. Richey reasons that this evidence was strongly mitigating and that the trial court and court of appeals erred by imposing a death sentence.

[30] Contrary to Richey's claims, courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents. *See Eddings* v. *Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1; *Skipper* v. *South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. What weight to be given mitigation evidence is necessarily an individual decision by the fact finder. ". . . The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State* v. *Steffen, supra*, paragraph two of the syllabus. *See, also, State* v. *Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus.

[31] At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight. *See State* v. *Cooey, supra*, 46 Ohio St.3d at 41, 544 N.E.2d at 919; *State* v. *Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 889-90.

Richey's Proposition of Law XIX also lacks merit. The court of appeals did not err when it referred to millions of persons with backgrounds similar to Richey's. By so doing, the court simply reflected its view that his family background was not mitigating. We have used similar reasoning. *See State* v. *Dickerson* (1989), 45 Ohio St.3d 206, 218, 543 N.E.2d 1250, 1261; *State* v. *Broom, supra*, 40 Ohio St.3d at 294, 533 N.E.2d at 701.

The court of appeals' written opinion demonstrates that the court performed its constitutional obligation of giving "individualized consideration" to the appropriate penalty for Richey. *Lockett* v. *Ohio* (1978), 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990; *Eddings* v. *Oklahoma* (1982), 455 U.S. 104, 102 S.Ct.869, 71 L.Ed.2d 1. Moreover, our independent evaluation of the evidence cures any sentencing errors by the trial court or the court of appeals. *See Clemons* v. *Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *State* v. *Lott, supra*; *State* v. *Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710.

X

Sentence Evaluation

In Proposition of Law XVIII, Richey argues that his death sentence was inappropriate based upon residual doubt, the admission of irrelevant evidence of threats, and overwhelming mitigation evidence. Richey does not dispute, and we find, that the aggravating circumstance, that the murder occurred during an aggravated arson, was proved beyond a reasonable doubt.

Richey presented extensive mitigating evidence that he suffered "borderline" and "antisocial" personality disorders. According to Dr. Leena Puhakka, a psychologist, Richey displayed classic symptoms of those personality disorders. Dr.

Puhakka found Richey functioned at the emotional level of a ten- or twelve-year-old. Dr. Antoine Demosthene, a psychiatrist, found no evidence of psychosis or mental disease, although Richey was very socially maladjusted, and suffered antisocial personality disorder.

Dr. William McIntosh, a psychologist, testified that Richey frequently lied to manipulate the results of mental evaluations. He stated that Richey had come from a chaotic family background, had an early history of violence and drug abuse, and displayed erratic behavior and poor impulse control. Although not psychotic, Richey did have mental disorders, according to Dr. McIntosh.

Dr. Thomas Sherman, a board-certified psychiatrist testifying by deposition for the state, found Richey "extremely impulsive, self-centered, hedonistic." He stated that Richey did not display any psychosis or inability to understand the criminality of his acts or to refrain from those acts.

Evidence by psychiatrists and psychologists also revealed Richey's preoccupation with death, blood, and violence, and his acts of self-mutilation and attempts at suicide resulting in over six hundred self-imposed scars and cuts on his body. Richey received his first mental health evaluation in January 1978, when thirteen years old, and has been briefly treated and evaluated for erratic behavior in various mental institutions.

Social worker Judith Tolliver described Richey as a blustering young man who suffered from a "histrionic behavior disorder" in addition to his other personality disorders. She found Richey not delusional, mentally impaired or actively psychotic but severely and chronically maladjusted.

Richey was born in Holland in August 1964, where his father was stationed as a member of the United States Armed Forces. His mother was Scottish. Richey was raised mostly in Scotland, where his parents lived. As a teenage boy in Scotland, Richey

was arrested several times for fighting, larceny, and breaking and entering. Richey came to the United States in 1982 and worked for his father, and he also travelled to different cities and worked at different jobs. In 1984, Richey joined the Marine Corps, and he served for fourteen months before being honorably discharged. Richey also was married in Minnesota and fathered a son, but afterwards his wife divorced him.

Our independent assessment of the evidence reveals some mitigating features in Richey's history and background. Richey's mother abused alcohol and taught him to resent authority. Richey suffers from life-long borderline and antisocial personality disorders. Richey also served more than a year in the United States Marine Corps and was honorably discharged. All of these factors are entitled to some mitigating weight. Otherwise, little else in Richey's history, character, or background is mitigating. Although Richey abused alcohol and drugs, nothing suggests a serious drug addition. On balance, his history, character and background do not offer substantial mitigating features.

Nothing in the nature and circumstances of the offense offers any mitigating features. Richey killed a defenseless child, whose safety had been entrusted to him, as a result of a blind, jealous rage at his ex-girlfriend and her current lover. The fact that he killed an unintended victim rather than the intended victims does not alter his moral culpability under the firmly established doctrine of transferred intent. *State* v. *Solomon*; *Wareham* v. *State*, both *supra*. His ostensible efforts to save Cynthia did not help her and interfered with firemen's efforts to rescue her and fight the fire. Under the circumstances, nothing in the facts of the offense is mitigating.

[32] The murder victim did not induce or facilitate the offense nor was Richey under "duress, coercion, or strong provocation"; hence, R.C. 2929.04(B)(1) and (B)(2) do not apply. Richey did not suffer, at the time of the offense, from a

"mental disease or defect"; therefore, R.C. 2929.04(B)(3) did not apply. A behavior or personality disorder does not qualify as a mental defect or disease. *State* v. *Cooey*; *State* v. *Van Hook, supra*. Richey's age of twenty-one when he committed the offense is a relevant statutory mitigating factor entitled to weight under R.C. 2929.04(B)(4). Richey's prior adjudications as a juvenile offender and his adult record of arrests and convictions preclude finding the lack of a record as a mitigating factor. *See* R.C. 2929.04(B)(5). The evidence shows that Richey was the only actor in these crimes; hence, R.C. 2929.04(B)(7) does not apply.

[33] Richey suggests residual doubt as an "other factor," R.C. 2929.04(B)(7). Depending upon the facts, residual doubt can be a mitigating factor. *State* v. *Walton*, *supra*. However, the strong evidence of guilt in this case precludes awarding residual doubt any mitigating value.

Richey also argues that the admission of irrelevant evidence that he threatened the prosecutor and witnesses showed the unfairness of the trial and rendered the death penalty inappropriate. However, such evidence related to his "history, character, and background," R.C. 2929.04(B), and thus was relevant to the death penalty determination. Richey's background and his personality disorders are relevant under R.C. 2929.04(B)(7), but their impact has already been considered as part of his background and history. No other mitigation appears relevant as "other factors" under R.C. 2929.04(B)(7).

Despite this mitigation evidence, the aggravating circumstances outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child. Applicable mitigating factors are of little weight when compared to the aggravating circumstances proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have per-

sonality disorders. Thus, his background did not contain any substantial mitigating features.

The death penalty is appropriate and proportionate when compared with similar felony murder cases. *See State* v. *Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State* v. *Lott, supra* (felony murder, victim set on fire); *State* v. *Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 409 (felony murder); *State* v. *Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State* v. *DePew, supra* (felony murder including arson, three victims including a seven-year-old); *State* v. *Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State* v. *Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old victim); *State* v. *Maurer*, *supra* (felony murder, seven-year-old victim).

Accordingly, we affirm the convictions and sentence, including the death penalty.

Judgment affirmed.

HOLMES, DOUGLAS and RESNICK, JJ., concur.

SWEENEY, WRIGHT and HERBERT R. BROWN, JJ., dissent.

HERBERT R. BROWN, Justice, dissenting.

I must respectfully dissent. For the reasons set forth below, I would overturn the sentence of death.

R.C. 2929.05 requires us to undertake a three-part analysis: the court must review proposed errors, weigh aggravating circumstances against mitigating factors, and compare the sentence to those imposed in similar cases. I disagree with all three parts of the majority's analysis.

I

Mitigation

The majority asserts that "[n]othing in the nature and circumstances of the offense offers any mitigating features." This statement is shocking, in view of the fact that Richey actively tried to save Cynthia Collins. His efforts were not "ostensible," as characterized by the majority; Richey put his own life in danger by physically being in the burning apartment. He repeatedly and hysterically told the firemen and anyone else nearby: "there's a baby in there." He also told the firemen where Cynthia was in the apartment. The majority cruelly misconstrues the evidence when it asserts that the defendant's efforts interfered with those of the firemen. The defendant was overwrought in his concern for the child. While there is some evidence that his presence (because he was overwrought) was not helpful, this is in no sense contradictory to the fact that defendant's desire was to save the child. Further, the officials clearly identified in the record as physically restraining Richey and keeping him away from the apartment were special deputies and a police officer in civilian clothing. These people would not and could not have directly fought the fire or rescued Cynthia.

In addition, no evidence of any animus toward Cynthia was presented. In fact, the prosecutor admitted in oral argument before this court that there was no evidence that Richey had any intent to kill Cynthia. Chief of Police Miller testified that Richey was concerned about Cynthia, and special agent Chandler testified that Richey repeatedly asked about Cynthia while the fire was being put out. Richey's rescue attempt and the fact that the victim was unintended are strong mitigating factors that should have been considered in this case. When these factors are considered, the balance shifts against the death penalty.

II

Claims of Error

The majority dismisses several of the defendant's propositions of law without real analysis of the issues.

A

Evidence of Threats

Several of defendant's propositions of law deal with evidence that he made threats against the prosecutor and potential witnesses while in custody. The majority first contends that the issue of admissibility of these threats is waived. Richey did move to suppress the statements, and the fact that he did not specifically object to their admissibility does not automatically mean they are waived. ". . . [A]n appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided . . ." *State* v. *Williams* (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367. Richey brought this error to the trial court's attention by the motion to suppress, and thus there is no waiver. *See*, generally, *State* v. *Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

The majority also contends that Richey's threats "reflect a consciousness of his guilt," and should therefore be admissible. It is by no means clear that this is so. A person wrongly accused could easily take out his frustration and anger in this fashion. In particular, Richey's anti-social and borderline personality traits might make the urge to lash out from a false accusation stronger. In any case, jailhouse threats are of a different order than flight from prosecution or a coverup as evidence of guilt.

The threats made by Richey are, pure and simple, acts separate and distinct from the one for which he was being tried. Proof of such threats can be admitted during the guilt phase only to show motive, opportunity, intent, plan, and so forth. (Evid.R. 404[B]). As the threats came after the events for which Richey was being tried, none of these factors can possibly be proved by evidence of later threats. Therefore the evidence is inadmissible for the guilt phase of trial, and it was error for the trial court to admit it.

Nor should evidence of the threats have been used in the sentence deliberations. The majority contends that this evidence is part of his "history, character, and background" and that any criminal wrongdoing is properly included in a presentence report. The cases cited for this proposition are easily distinguishable from the present situation. In *State* v. *Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, the presentence investigation report included under the heading "Prior Crimial Record" allegations for which the defendant had never been tried. The majority in that case held that the statements were permissible in the presentence report under "social history" of the defendant. The incidents referred to were a violent assault and a sexual assault on a small child, not jailhouse threats. In *State* v. *Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, it was the defendant's arrest record that was at issue. A defendant's arrest record is part of his "prior criminal record," and thus can be included in a presentence report. *Id.* at 43, 559 N.E.2d at 441. Richey's threats were not part of a "prior criminal record," as they occurred after the events for which he is being tried, and he has never been charged or convicted of anything stemming from the threats.

Evidence of Richey's threats relates to his history, character or background in only the most marginal way. Its prejudicial impact is clear from the court's own actions; the judges thought Richey so dangerous that they had him shackled during the trial

and allowed deputies to carry firearms and search people entering the courtroom. Considering these factors, evidence of the threats was not properly used either in the guilt phase or in sentence deliberations.

B

Letter

While in pretrial custody, Richey wrote a letter to a friend in Scotland. The trial court originally suppressed the letter as irrelevant to either the guilt or penalty phase. The letter was lated included in the presentence report.

The majority contends that "[a]rguably that letter was relevant to the sentencing decision." I fail to see how it could have been relevant. The letter is simply a written version of the same threats Richey made verbally,[1] as well as more "other acts" evidence about events in Scotland which occurred years earlier. The letter is highly prejudicial, in particular Richey's reference to bringing back the death penalty in Scotland. The same objections made above to the admissibility of the verbal threats apply here. The letter is not part of a prior criminal record, and any relation to Richey's history, character and background is tenuous at best. This, together with its highly prejudicial nature, should have made the letter inadmissible in the sentencing deliberations.

In addition, Richey's objection to the letter was not waived. Error as to the letter had been brought to the trial court's attention in the original motion to suppress. It was prejudicial error for the trial court to have admitted the letter in the presentence report.[2]

---

[1] The threats in the letter were not even directed toward the parties threatened, but were more in the nature of boasts to Richey's friend in Scotland.

[2] ". . . The report should include only such information as is directly relevant to the aggravating and mitigating circumstances. . . . *State* v. *Glenn* (1986), 28 Ohio St.3d 451, 28 OBR 501, 504 N.E.2d 701, paragraph two of the syllabus.

III

Proportionality of the Death Penalty

Besides reviewing the claims of error and weighing aggravating circumstances against mitigating factors, we must decide whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. It is this last part of the analysis which most clearly reveals how inappropriate the death penalty is in this case.

Several cases are cited by the majority to show the proportionality of the death penalty in this case. However, if one reads those cases (which are merely listed and not analyzed by the majority), it is obvious that not one is remotely similar to this one. The defendant in *State* v. *Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082, shot the victim at close range and then beat him. In *State* v. *Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293, the victim was directly doused with lamp oil and set on fire. In *State* v. *Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408, the defendant had been roaming a bar and threatening patrons with a loaded gun. The victim refused to lie down when ordered, and defendant shot him in the back. In *State* v. *Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191, the defendant kidnapped a seven-year-old girl intending to rape her. He partially asphyxiated her and threw her out a fourth-story window. Although arson is involved in *State* v. *DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, the victims all died of multiple stab wounds inflicted before the fire was started. In *State* v. *Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267, a twelve-year-old boy was savagely beaten to death in revenge for something his brother had done. The victim in *State* v. *Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, had been kidnapped, sexually assaulted and strangled. The victim in *State* v. *Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, had been kidnapped,

sexually assaulted and shot. In each case, the defendant had clear animus toward the victim, or harmed the victim in a direct, face-to-face encounter, or both.

Cases of transferred intent where the death penalty was imposed also involve face-to-face violent encounters between victim and defendant. For example, in *State* v. *Sowell* (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294, defendant forced his way into the apartment where his intended victim was a guest. Rather than be escorted outside by the person who opened the door, defendant shot him in the head.

I find no case in Ohio where a defendant in a felony murder case has been put to death unless he had specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both.[3] As discussed above, there is no evidence that Richey had specific animus towards Cynthia Collins. On the contrary, he showed concern for her life while the fire was in progress. Even if the defendant's intent can be inferred from the circumstances, or transferred from the animus shown towards others, the circumstances involve no specific animus or face-to-face violent encounter. There is a stunning difference between this case and those cited as comparable by the majority.

Under the Eighth and Fourteenth Amendments to the United States Constitution, as well as R.C. 2929.05, we are obligated to perform a *meaningful* proportionality review of the death

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[3]The facts in this case of *State* v. *Thompson* (1977), 55 Ohio App.2d 17, 9 O.O.3d 190, 379 N.E.2d 245, are similar to those in this case. Firemen died as a result of fighting an arson fire in a restaurant. The court of appeals found that the trial judges were justified in finding intent from the act of arson, plus defendants' knowledge that others were actually exposed to the danger they created. The case was never reviewed by this court, nor was the death penalty imposed. I believe that it reaches too far to find intent; to kill a fireman from the act of arson and the knowledge of danger alone. If this were the rule, any time someone dies in an arson fire the defendant would be guilty of aggravated murder. This essentially abrogates the long-standing Ohio rule that specific intent is needed for aggravated murder, and would render it no different from felony murder in other states.

penalty in every case. *See Gregg* v. *Georgia* (1976), 4 U.S. 153, 173, 187, 204-06, 223-24 S.Ct. 2909, 2925, 2932-32, 2939-29, 2948-49 L.Ed.2d 859, 875, 882, 890, 893, 902-03; *see, also, Furman* v. *Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, L.Ed.2d 346, Such a review deserves more than lip service and a listing of cases which are in no sense comparable to this one. There has been no meaningful proportionality review in this case. The death penalty is not warranted, and I must dissent.

SWEENEY and WRIGHT, JJ., concur the foregoing dissenting opinion.

APPENDIX D.

IN THE COURT OF COMMON PLEAS
OF PUTNAM COUNTY, OHIO

STATE OF OHIO
PLAINTIFF

v.

KENNETH RICHEY
DEFENDANT

CASE NO. CR86-21

VERDICT FORM

COUNT 1

* * * * *

We the panel pursuant to our oaths find the defendant, Kenneth Richey guilty of Count #1 as set forth in the indictment.

We the panel pursuant to our oaths find that the State of Ohio proved the specification beyond a reasonable doubt and that the defendant was the principal offender.

We the panel further find that the defendant formed the specific intent to cause the death of another to-wit Cynthia Collins.

/s/_____

/s/_____ 1/8/87

/s/_____

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-1059

In The

Supreme Court of the United States

October Term, 1995

KENNETH T. RICHEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE PROCEDURE PROVIDED BY THE STATE OF OHIO PURSUANT TO *STATE V. MURNAHAN*, 63 OHIO ST. 3d 353, 584 N. E. 2d 1204 (1992) and OHIO RULE OF APPELLATE PROCEDURE 26(B), PRECLUDED MEANINGFUL REVIEW OF THE MERITS OF RICHEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

2. WHETHER THE INEFFECTIVE ASSISTANCE OF PETITIONER'S PRIOR APPELLATE COUNSEL VIOLATED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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Ohio Revised Code Section 2953.21 8

STATEMENT OF THE CASE

Petitioner was charged and convicted of setting an arson fire on June 30, 1986 in Putnam County, Ohio in which a two-year-old child died. The child was the resident of an apartment complex. The State maintained at trial that the Petitioner, in a jealous rage, set the fire to specifically cause the death of the girl that had just broken off a relationship with Petitioner whose name was Candy Barchet. Evidence in the trial indicated that the Petitioner said before the fire that he was going to torch the building, he bragged about the fire after it was over and he had threatened several people "that if he can't have her (Candy) nobody else can". The State Fire Marshall upon investigation determined that accelerants were used in the fire and that Petitioner had broken into a greenhouse across the street from the complex which had the type of accelerant that were used. The matter was tried to a three-judge panel. The defendant was convicted and sentenced to death on February 9, 1987. The Ohio Court of Appeals affirmed a conviction and death sentence on December 28, 1989. The Ohio Supreme Court affirmed the judgment of conviction and death sentence on August 12, 1992 at *State v. Richey* 64 Ohio St. 3d 353. After a Motion for Rehearing was filed and denied, Petitioner filed a Petition for Writ of Certiorari with this Court which was denied March 22, 1993. 113 S. Ct. 1592 (1993).

Petitioner was given a stay of execution by the Supreme Court of Ohio for purposes of instituting a petition for post-conviction relief, but shortly before the stay was to expire his counsel filed a notice of withdrawal. The day following the notice of withdrawal, Petitioner filed an application in the Court of Appeals for the

Third Appellate District asking to reopen his direct appeal because he was denied effective assistance of counsel. (Murnahan Motion)

Richey has filed his petition in this Court asking it to review and find unconstitutional Ohio's procedure for raising ineffective assistance of appellate counsel claims; both generally, as a violation of his constitutional right to competent counsel as afforded by the Sixth and Fourteenth Amendment and specifically as applied to his case. Petitioner filed an application under Ohio Appellate Rule 26(B) asking that the Court of Appeals reopen his direct appeal on April 5, 1994. He alleged in twenty-two (22) Assignments of Error that appellate counsel was inadequate. Of the twenty-two (22) assignments, he alleged that the first sixteen were completely missed by prior counsel, five (5) were inadequately addressed by appellate counsel, and lastly he alleged that appellate counsel intentionally withheld meritorious assignments of error, so as not to professionally embarrass another attorney. The Court of Appeals on January 4, 1995 found that the application was untimely filed and that the Defendant-Appellant's explanation for the delay failed to demonstrate good cause. Notwithstanding this finding, the Court of Appeals ruled as to each of the assignments of error finding some were waived at trial, some were precluded by settled law, and several more were merely restated of issues that had been addressed. With regard to the five that were inadequately addressed, the Court found nothing in the record that they were not thoroughly and completely argued. With regard to the conflict of interest claims, the Court of Appeals found nothing in the record but the bare unsubstantiated self-

serving allegation of his then attorney and found them insufficient as a matter of law.

The Petitioner then appealed this decision to the Ohio Supreme Court on February 15, 1995. On June 21, 1995 the Ohio Supreme Court affirmed the decision of the Court of Appeals. This Petition for a Writ of Certiorari follows.

The primary issue is whether the finality of an appellate court's decision is lost because new counsel can now think of new issues or claims that might have been raised by prior appellate counsel. The focus ought to be on whether in light of the record and the law it was reasonable for an attorney to raise the claims raised by his appellate counsel and not to raise "new" issues subsequent counsel has found. If this were not the test procedural defaults would easily be avoided in every case by self-serving affidavits and objective standards of reasonableness and prejudice set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1989) would be avoided.

1. WHETHER THE PROCEDURE PROVIDED BY THE STATE OF OHIO PURSUANT TO *STATE V. MURNAHAN*, 63 OHIO ST. 3d 353, 584 N. E. 2d 1204 (1992) and OHIO RULE OF APPELLATE PROCEDURE 26(B), PRECLUDED MEANINGFUL REVIEW OF THE MERITS OF RICHEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Ohio provides an avenue for raising ineffective assistance of appellate counsel claims, but petitioner complains that Ohio has placed certain procedural

requirements on the filing of such claims. This Court has sanctioned the imposition of such procedural requirements, and there is no compelling reason to revisit the issue. *Francis v. Henderson*, 425 U.S. 536 (1976); *Engle v. Isaac*, 456 U.S. 107 (1982); *Michael v. Louisiana*, 350 U.S. 91, 97 (1955); see also, *State v. Carter*, 70 Ohio St. 3d 642, 640 N.E. 2d 811 (Ohio 1994), *cert. denied*, 115 S. Ct. 1328 (1995) (Carter argued that he could not timely file Application because he was represented by the same attorneys throughout his direct appeal and beyond the ninety-day time period).

Ohio provides two procedures for the litigation of ineffective assistance of appellate counsel claims: direct appeal to the Ohio Supreme Court, or Application for Reopening in the Court of Appeals. See *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N. E. 2d 1204 (Ohio 1992), paragraph two of the syllabus. Richey chose the latter procedure, which by Ohio Appellate Rule 26(B) required him to file his application within ninety days of the court of appeals' judgment (in this case that meant within ninety days of December 28, 1989); applicants who file after this time period must demonstrate good cause for untimely filing. Richey filed his application on April 5, 1994. Richey argues that he delayed because the same attorneys had been representing him in his appeals, and thus they could not be expected to raise their own ineffectiveness. The State of Ohio offers two answers to this claim: (a) the Ohio courts addressed the merits of his ineffective assistance of appellate counsel claims and thus Richey was not prejudiced by the courts' finding that there was no good cause to excuse the untimely filing; and (b) Richey failed

to offer a good excuse for waiting three and a half years to file his Application for Reopening.

(A) The Ohio Courts Addressed the Merits of Richey's Ineffective Assistance of Appellate Counsel Claims.

Richey blindly maintains that the court of appeals refused to address the merits of his Application for Reopening. If this were true, the court of appeals would have ended its discussion on page one of the opinion after its discussion of good cause. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 1. But the court of appeals went on to address the claims "notwithstanding the fatal procedural defect." *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 2. The court explained that of the first sixteen assignments of error "several of the issues were waived at trial, some were precluded by settled law and several [were] merely restatements of issues addressed by this court and the supreme court on appeal." *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 2. The court discussed how appellate counsel's failure to raise these claims could not constitute ineffective assistance. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3. The court also discussed assignments of error seventeen through twenty-one and held that these claims were raised in the direct appeal, and thus there was no ineffective assistance. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3.

The court discussed at length Richey's twenty-second assignment of error because in it Richey claimed that a

conflict of interest prevented one of his two appointed counsel from raising on appeal a thorough ineffective-assistance-of-trial-counsel claim. *State v. Richey*, Case No. 12- 87-2, Journal Entry, January 4, 1995, p. 3. The court of appeals noted that Richey's other counsel, Ms. Perry, expressly acknowledged that she was unaware of the conflict, and thus nothing prevented her from arguing the ineffective-assistance-of-trial-counsel claim more vigorously. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3.

The Ohio Supreme Court adopted the court of appeals' reasoning with respect to these assignments of error, and the court also addressed the claims Richey added in the Ohio Supreme Court. *State v. Richey*, 73 Ohio St. 3d 523, 653 N.E. 2d 344, 345 (Ohio 1995).

(B) Richey Failed to Justify the Three and One-Half Year Delay in Raising his Ineffective Assistance of Appellate Counsel Claims.

Ohio Appellate Rule 26(B) allows for the presentation of untimely applications upon demonstration of good cause for the untimely filing. Ohio Appellate Rule 26(B)2(b). Richey does not contest the reasonableness of the ninety-day time limit for filing, see *Michael v. Louisiana*, 350 U.S. 91, 97 (1955); he argues instead that the Ohio courts incorrectly determined as a factual matter that he failed to demonstrate good cause. But as the facts surrounding Richey's delay demonstrate, the Ohio courts' conclusion is amply supported by the record.

The Putnam County Court of Appeals affirmed Richey's conviction and death sentence on December 28,

1989. Mr. Murray and Ms. Perry represented Richey in this appeal. Richey fails to explain why he did not assert the claims himself, which is not unreasonable to expect since Richey does not have a constitutional right to appointed counsel in a post-conviction proceeding. *Murray v. Giarratano*, 492 U.S. 1 (1989)

Richey had even more opportunities to raise his claims. Richey appealed to the Ohio Supreme Court and this time his counsel were Ms. Perry and Mr. Kevin Fahey. Mr. Murray, the subject of the "conflict-of-interest claim" raised in Richey's Application for Reopening, was no longer representing Richey.

After the Ohio Supreme Court affirmed Richey's conviction on August 12, 1992, Richey filed a motion for a new trial, through attorneys David C. Stebbins and Randall L. Porter. This was overruled. Then Richey filed a Petition for a Writ of Certiorari to this court with attorneys Clive A. Stafford Smith and Kevin Fahey. The petition was denied in 1993. *Richey v. Ohio*, 113 S. Ct. 1592 (1993).

On January 25, 1994, Richey's present attorneys, Paul Nemser, et al., filed a motion to appear on behalf of Richey, which the court of appeals granted on February 2, 1994. The next set of events in the case is the most interesting . On the day after Richey's Public Defenders sought to withdraw from the case, April 4, 1994, Richey miraculously filed a ten (10) page Application for Reopening, which included among other things a thirty-eight (38) page appendix containing affidavits from the Public Defenders professing their own ineffectiveness. The application had to have been prepared before the

public Defenders withdrew from the case, and Richey failed to explain why the numerous different attorneys who had represented Richey at different stages of his appeals process could not accomplish what Richey's present counsel did: prepare an Application for Reopening while the conflict-of-interest attorneys still represented Richey. In fact, in support of their application, they admit meeting with Richey's Public Defenders in December, 1993. (See App A.)

Richey fails to mention the participation of these other counsel, and he instead argues that representation by the same counsel precluded the presentation of his claims until those attorneys withdrew. Aside from the factual inaccuracy of this contention, it lacks merit as a legal proposition. In essence, petitioner's "same counsel equals automatic good cause" causes delay. By retaining the same counsel throughout his state court appeals, petitioner would be able to put off the presentation of his ineffective assistance of appellate counsel claims almost indefinitely. In fact, under petitioner's reasoning, he could have kept the same counsel to file a post-conviction petition under Ohio Revised Code 2953.21 and to represent him in the appeals therefrom. If one assumes two to three years to exhaust his post-conviction remedies (a conservative estimate), petitioner would be able to raise his ineffective assistance of appellate counsel claims five to six years after the court of appeals' judgment.

Petitioner's reasoning also would cause an enormous waste of precious judicial resources. A successful Application for Reopening results in the reinstatement of the defendant's direct appeal. If Richey had presented meritorious claims in his April 1994 Application, then all of

the litigation after the December 1989 court of appeals' judgment would have been wasted – three and a half years of wasted litigation. By requiring the defendant to file his application within ninety days of the court of appeals' judgment, Ohio Appellate Rule 26(B) strikes a reasonable balance between the defendant's rights and Ohio's interest in the speedy and economical administration of justice.

In sum, petitioner's specific question presented, whether Ohio promised a forum in which ineffective assistance of appellate counsel claims can be litigated, is answered by Ohio Appellate Rule 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E. 2d 1204 (Ohio 1992). Petitioner's real complaint is with the Ohio courts' discretionary, factual determination that he failed to justify his delay in bringing his claims. This complaint is especially meaningless in light of the fact that the Ohio courts nevertheless addressed the merits of his claims.

2. WHETHER THE INEFFECTIVE ASSISTANCE OF PETITIONER'S PRIOR APPELLATE COUNSEL VIOLATED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Defendant is alleging that he was denied the effective assistance of Appellate Counsel by focusing on six instances in which Appellate Counsel failed to act or to raise claimed errors. The first five of these instances involve assertions that Appellate Counsel failed to raise issues involving variances between indictment, bill of

particulars, the evidence, and the verdict form. The sixth involves the issue whether the defendant was prejudiced by the manner in which he waived his right to a jury trial. The Ohio Supreme Court in *State v. Campbell*, 69 Ohio St. 3d 38 (1994), set out Ohio Law regarding ineffective assistance of appellate counsel. It held:

> "Counsel need not raise all non-frivolous issues on appeal. *Jones v. Barnes*, (1983), 463 U.S. 745, 751, 103 S. Ct. 3308, 3312-2213, 77 L. Ed. 2d 987, 993. Campbell's counsel raised thirteen assignments of error in the court of appeals. Counsel could have reasonably decided they could not add twenty-six more issues without 'burying good arguments . . . in a verbal mound made up of strong and weak contentions.' 463 U.S. at 753, 103 S. Ct. at 3313, 77 L. Ed. 2d at 994. Moreover, several issues on Campbell's list were waived at trial and some were precluded by settled law. Others may have had arguable merit but are 'sufficiently problematical that the refusal to raise them cannot be assailed as an unreasonable professional judgment.' *Cunningham v. Henderson* (C.A. 2, 1984), 725 F. 2d 32, 36."

Thus, to raise a colorable claim of ineffective assistance of counsel the analysis must be based upon (1) whether the issue was raised at trial and, (2) whether the issue was precluded by settled law. Where errors are raised by counsel, appellate counsel is presumed to exercise professional judgment to avoid burying good argum ıts among weak ones.

In his application for re-opening the Court of Appeals, defendant claimed that his appellate Counsel failed to think of certain claims. However, this Court has

held that the "failure to think of claims", is not a sufficient error in professional judgment to avoid a procedural default claim. In *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558 (1982), at 133, 134; 1575 held:

> "Counsel might have overlooked or chosen to omit respondent's due process argument while pursuing other avenues of defendant. We have long recognized, however, that the **Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim**. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default." (emphasis added).

Thus, counsel has no constitutionally imposed duty to "think of" every issue.

In his first assertion, Petitioner claims he was convicted of a crime different than the crime that was charged in the bill of particulars. However a bill of particulars does not charge this defendant or any defendant with a crime. The indictment charged the defendant with aggravated murder with specific intent to kill Cynthia Collins. The bill of particulars alleged that the defendant intended to kill Candy Barchet, his ex-girlfriend and/or her lover Mike Nichols and this intent was transferred to Cynthia Collins. It must be remembered that only one person was killed and that was Cynthia Collins, a two-year-old girl. The State never claimed that Candy Barchet or Mike Nichols were killed. The petitioner was never

mislead, nor was forced to defend himself against other charges. The Supreme Court of Ohio in *State v. Richey*, 64 Ohio St. 3d 353 applied the doctrine of transferred intent to this case. Since the Ohio Supreme Court cited and applied the doctrine of transferred intent no prejudice inured to the petitioner by the claimed failure of appellate counsel to raise the issue.

His second assertion is that his appellate counsel failed to review the verdict form and its claimed divergence from the bill of particulars. However, there is no requirement that transferred intent or specific intent be listed in the verdict form. *State v. Jenkins*, 15 Ohio St. 3d 164 (1984). Furthermore, the Ohio Supreme Court did find that specific intent to kill Nichols or Barchet transferred to and applied on behalf of Cynthia Collins. Clearly, reasonable appellate counsel cannot be faulted for not challenging settled Ohio Law.

Petitioner alleges in his third assertion that appellate counsel failed to challenge a fundamental variance between the indictment and the case tried against him. However, this is clearly not the case. Defendant's trial counsel knew at all times that defendant was indicted for and being tried for specifically intending to cause the death of Cynthia Collins, transferring from his specifically intending to kill Barchet and/or Nichols. Petitioner was in no way mislead, it is difficult to see prejudice and unreasonable to expect appellate counsel to raise it.

Petitioner next alleges that appellate counsel failed to challenge the fact that the verdict was ambiguous and in violation of a unanimous verdict requirement. Essentially,

petitioner is alleging that the "and/or" language used in the bill of particulars makes the conviction defective. This Court has previously held in *Shadd v. Arizona*, 11 S. Ct. 2491 (1991) that where a state's particular way of defining a crime has a long history, or is in wide spread use, it is unlikely that a defendant will be able to demonstrate that the state has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. The Court in *Shadd* went on to hold that felony murder is a "more equivalent of pre-meditation" and a jury need not unanimously decide on one of two theories of guilt. The same applies in this case. Ohio has a long history of applying transferred intent as stated in *State v. Sowell*, 39 Ohio St. 3d 322 (1988):

> "The doctrine of transferred intent is firmly rooted an Ohio Law. See *Wareham v. State*, (1874) 25 O. S. 601. Our decision in *State v. Solomon* 66 O. S. 2d 214 remains good law and we reiterate our holding that upon purposely cause the death of another and the death as a result of a schemed designated implement, the calculated decision to kill someone other than the victim, the defendant is guilty of aggravated murder."

There is nothing in the records to show appellant had a greater, moral or legal justification for killing Candy Barchet or Mike Nichols than Cynthia Collins. It would be unreasonable to expect competent appellate counsel to fault trial counsel in this area.

Richey next asserts that prior appellate counsel failed to challenge the application of the doctrine of transferred

intent. This is not prejudice because the Supreme Court of Ohio found that the doctrine did apply and affirmed the conviction. Petitioner cannot show the outcome would have been different.

The last instance cited by a petitioner is that appellate counsel failed to challenge the trial court's instruction regarding the waiver of the defendant's right to a trial by jury. On November 12, 1986, defendant signed a written waiver to his right to a jury trial pursuant to Ohio Revised Code Section 2945.05. One month later, December 12, 1986, this waiver was discussed at a hearing on pretrial motions. The presiding judge questioned the defendant at that time as to whether he would be withdrawing his waiver. The comments made by the judge at that hearing would only serve to heighten the care that the defendant would exercise in waiving his right to a jury trial. Nowhere in the transcript or the proceedings did the court ever prohibit the withdrawal of the waiver or undermine the statutory right of the defendant to withdraw his waiver before commencement of the case. Furthermore, there is nothing in the record to indicate the defendant wanted to withdraw his jury waiver. Moreover, there is nothing in the record or raised by petitioner that the outcome would have been different had he tried this matter to a jury as opposed to a three-judge panel. It is difficult to find fault with appellate counsel for failing to claim this as error.

CONCLUSION

Ohio's procedure for challenging ineffective assistance of appellate counsel comports with the Sixth and Fourteenth Amendments of the United States Constitution. Petitioner's claims were adequately addressed and reviewed both by the Third District Court of Appeals of Ohio and the Ohio Supreme Court both procedurally and on the merits. For reasons previously stated petitioner requests the Writ should be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, v. KENNETH T. RICHEY, Defendant-Appellant.	Case No. 90-338 (Court of Appeals No. 12872) **DEATH PENALTY CASE, STAY OF EXECUTION ENDS FEBRUARY 22, 1994**

AFFIDAVIT OF KEVIN L. FAHEY, ESQ. IN SUPPORT OF AGREED TO MOTION TO EXTEND TIME WITHIN WHICH TO FILE PETITION FOR POST-CONVICTION RELIEF

I, Kevin L. Fahey, Esq. (0043726), having been duly sworn, do state under oath:

(1) I am a member of the bar of Ohio in good standing. I am an Assistant State Public Defender, and have been since February 1990.

(2) The Ohio Public Defender Commission was appointed to represent Kenneth T. Richey on the appeal of his conviction and death sentence. Assistant State Public Defenders Ken Murray and Jane P. Perry represented Mr. Richey before the Court of Appeals for the Third Judicial District, Putnam County (Court of Appeals No. 12872). Attorney Perry and I represented Mr. Richey in his direct appeal to this Court. I represented Mr. Richey is connection with his petition to the United States Supreme Court for a writ of certiorari.

(3) One factor that distinguishes Mr. Richey's case from the majority of death penalty cases in this country is that in this case guilt/innocence is a genuine issue. Mr. Richey has steadfastly maintained his innocence. He turned down several plea bargain offers prior to and during trial, which offers would have made him parole eligible after serving eleven years, four months in prison. The evidence linking Mr. Richey to the alleged arson underlying his aggravated murder charge was purely circumstantial.

(4) During the pendency of Mr. Richey's appeal in the Ohio Supreme Court, Thames Television Limited, a British television production company, came to the United States and filmed a documentary about Mr. Richey's case. The documentary concluded: that Mr. Richey had been falsely accused; that he is not guilty; that the fire which took the life of Cynthia Collins may have been accidental; and that it is a travesty that Mr. Richey received the death penalty. Among the bases for the British documentary's conclusions were the following: (a) evidence that the carpet examined for accelerants may have been contaminated, after the fire but before examination, by being left in the town garbage dump for 36 hours and then by being opened outside on a parking lot surface next to gas pumps; (b) a statement from at least one witness that the fire alarm in the Collins' apartment had been detached by someone other than Mr. Richey earlier during the night in question, while Hope Collins, the mother of the decedent, was cooking pork chops for dinner; and (c) evidence that Cynthia Collins had a history of being fascinated by fire and of playing with

matches and/or lighters. None of this evidence came out at Mr. Richey's trial.

(5) On September 22, 1993, the Ohio Public Defender Commission began the process of obtaining all public records, as well as certain non-public documents, from which evidence *dehors* the record accelerants could be obtained.

(6) The Public Defender Commission is short staffed and has an overwhelming case-load. Of the 136 persons presently on death row in Ohio, the Public Defender is involved in the representation of 92 of them. This is at a time when we have only 19 attorneys in the death penalty unit, and C.P. Sup. [K.L.J.] R. 65 requires that two attorneys be on every capital case. In order to provide our death penalty clients with adequate post-conviction representation, we have been attempting to obtain help from the private bar. In Mr. Richey's case, we began attempting to obtain help from the private bar while Mr. Richey's case was on direct appeal. Our efforts included direct appeals to several Ohio law firms and to at least one law firm in Washington, D.C.

(7) In late October 1993, we learned that the Boston law firm of Goodwin, Procter & Hoar ("GP&H") had expressed an interest in representing Mr. Richey during post-conviction proceedings.

(8) On November 30, 1993, two attorneys from GP&H – Paul E. Nemser, Esq. and David J. Apfel, Esq. – came to our offices in Columbus, Ohio and met with me and several other attorneys regarding Mr. Richey's case. On December 1, 1993, Attorney Nemser and Attorney

Apfel met with Mr. Richey, and subsequently they agreed to take on Mr. Richey's post-conviction representation.

SWORN UNDER THE PAINS AND PENALTIES OF PERJURY this 25th [K.L.J.] day of January, 1994.

/s/ Kevin L. Fahey
Kevin L. Fahey

STATE OF OHIO
COUNTY OF FRANKLIN

On the 25th day of January, 1994, before me personally appeared Kevin L. Fahey, Esq. to me known, and acknowledged that his execution of the foregoing is his free act and deed.

/s/ Dale A. Baich
Notary Public
My Commission Expires:
DALE A. BAICH –
Attorney of Law
Notary Public –
STATE OF OHIO
My Commission has no
expiration
Date. SEC. 147.03 R. C.